

ARTICLES

BREAKING THE DRESS CODE: PROTECTING TRANSGENDER STUDENTS, THEIR IDENTITIES, AND THEIR RIGHTS

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“[S]afety and security don’t just happen: they are the result of collective consensus and public investment We owe our children—the most vulnerable citizens in any society—a life free from violence and fear.”¹

—Nelson Mandela, former President of South Africa

“Trans-identified youth who begin exploring their gender identity at an earlier age face similarly rampant discrimination as trans-identified adults. However, their youth and inexperience in life inevitably raises the stakes for them.”²

—National Gay and Lesbian Task Force Policy Institute

I. INTRODUCTION

Transgender people are a marginalized part of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community.³ Their rights are often the

1. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH V (2002), available at http://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf.

2. NAT’L GAY & LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 59 (2006), available at http://www.thetaskforce.org/reports_and_research/homeless_youth.

3. NAT’L CTR. FOR TRANSGENDER EQUAL. & THE NAT’L GAY AND LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY, available at http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf (providing statistical information illustrating the impact of transgender discrimination on social and economic stability). The National Gay and Lesbian Task Force, an organization that conducts research and policy analysis of issues affecting members of the LGBT community, made the following preliminary findings in its November 2009 National Transgender Discrimination Survey: The unemployment rate for transgender individuals is twice that of the general population rate. *Id.* at 1. Nearly all the transgender people surveyed reported experiencing mistreatment at work, and roughly half of them did not receive a job offer or were fired because of their transgender status at one point. *Id.* Furthermore, a high number are either living in poverty or actually homeless. *Id.* Over 6,000 extensive questionnaires were used to complete this national transgender survey. *Id.* The key findings listed above illustrate that transgender individuals face significant discrimination and harassment from many areas of their lives, but specifically within employment. *Id.* at 3.

first to be sacrificed in the LGBT movement.⁴ This is primarily because being gay and being transgender are two separate concepts. Being gay or lesbian refers to whom you are attracted (e.g., your sexual orientation), whereas being transgender refers to what gender you identify as and how you choose to express this identity.

Professor Kenji Yoshino's discussion about how he arrived at his gay identity in his book, *Covering*, illuminates why there is a distinction between being gay and being transgender.⁵ First, Yoshino explains, he experienced "conversion."⁶ In this phase, he prayed that he would not be gay.⁷ In the second phase, "passing," he accepted his identity, but hid it from others.⁸ In the third phase, "covering," most of Yoshino's work colleagues knew that he was gay, but he chose to "tone down" his "gayness" by not writing on topics related to the gay community or engaging in public displays of affection.⁹

Like someone who is gay, a transgender person may undergo "conversion" and may also "pass" by adhering to traditional gender roles.¹⁰ However, after a transgender person embraces their gender identity, this

Transgender individuals need legal protection to help gain and maintain employment, which will hopefully counteract the increased poverty levels within this marginalized class. See *id.* at 1.

4. See, e.g., Andrew Miga, *House Passes Ban on Job Bias Against Gays*, THE PRESS OF ATLANTIC CITY, Nov. 8, 2007, at A3, available at 2007 WLNR 22102106 (discussing the controversy following House approval of a federal ban on discrimination based on sexual orientation after the transgender community was removed from the list of those protected). In November 2007, transgender discrimination and harassment in the workplace was a point of contention for the House of Representatives when it passed the Employment Non-Discrimination Act (ENDA). *Id.* The bill was originally intended to "make it illegal for employers to make decisions about hiring, firing, promoting or paying an employee based on sexual orientation," including people with Gender Identity Disorder (GID). *Id.* However, the GID language was removed to secure more moderate votes. *Id.* After the committee vote, Representative Tammy Baldwin (D-WI), one of two openly gay Congresspersons, introduced an amendment that would add the GID language back into the bill. See Press Release, Congresswoman Tammy Baldwin, Statement on ENDA, "Keeping our Eyes on the Prize" (Oct. 11, 2007) available at <http://tammybaldwin.house.gov/PRArticle.aspx?NewsID=1416> (advocating for a fully inclusive ENDA protecting all LGBT people from employment discrimination). Another key advocate of this bill was the Human Rights Campaign (HRC). See HUMAN RIGHTS CAMPAIGN, STATEMENTS OF SUPPORT FOR THE EMPLOYMENT NON-DISCRIMINATION ACT (2007), available at <http://www.hrc.org/issues/workplace/5635.htm> (urging the passage of an inclusive ENDA).

5. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 17-18 (2006).

6. *Id.* at 17.

7. *Id.*

8. *Id.* at 17-18.

9. *Id.*

10. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 17-18 (2006); JULIA SERANO, *WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND*

arguably forecloses identity “covering” because being transgender troubles the male-female binary that, put in the simplest of terms, people who are biologically “girls” will dress like “girls” and people who are biologically “boys” will dress like “boys.” Thus, transgender people who embrace their gender identity are immediately subjected to the judgment of a society wed to gender norms and the male-female binary. As a result, on a daily basis, most transgender people experience violence, abuse, and discrimination.¹¹ This is especially true for transgender youth,¹² who, because of their age, “are uniquely vulnerable to abuse, violence, and discrimination.”¹³

While many children are given the opportunity to mature and become equipped for independent living through school and through their family environment, transgender youth are often not afforded this luxury.¹⁴ Early in their lives, transgender youth become victims of both verbal and physical bullying at school and at home because their outward appear-

THE SCAPEGOATING OF FEMININITY 299 (2007) (noting that crossdressers undergo a comparable transformation phase by adopting gendered clothing reflective of their identity).

11. Paisley Currah et al., *Introduction* to TRANSGENER RIGHTS xiii, xiv (Paisley Currah et al. eds., 2006) (delineating the changes in the transgender movement in the United States throughout the last few decades). Gender identity is now included in the nondiscrimination policies of more than two hundred employers. *Id.* at xiii. In 2004, a federal appellate court ruled for the first time that transgender people are protected against employment discrimination under Title VII of the 1964 Federal Civil Rights Act. *Id.* Despite this progress, most transgender individuals do not have a secure legal status, and in many states are considered “nonpersons” without the right to use a public restroom, work, marry, or even feel safe while walking down the street. *Id.* at xiv.

12. Although many studies consider transgender individuals between the ages of 15–24 to be transgender youth, this Article focuses only on transgender youth in K–12 education.

13. Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. (SPECIAL ISSUE) 774, 775 (2006) (explaining the difficulties youth face when they publicly identify themselves as homosexual, bisexual, or transgender). For generations, many people in positions of authority in the lives of children have assumed lesbian, gay, bisexual, transgender, and questioning (LGBTQ) behavior was a temporary phase of experimentation. *Id.* at 804. This Article urges modern lawyers to transcend this antiquated view and strive for sensitivity by acknowledging and respecting LGBTQ youth, rather than merely tolerating them. *Id.* This will allow LGBTQ youth the freedom to securely “create their own paths.” *Id.*

14. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENER RIGHTS 217, 219 (Paisley Currah et al. eds., 2006) (describing the early obstacles that many transgender youth encounter). Many transgender youth experience physical abuse and harassment at home, which often extends to the schools and communities that these youth live in and attend. Symposium Transcript, *Mischief and Mayhem: A Symposium on Legal Issues Affecting Youth in the Child Welfare and Juvenile Justice Systems*, 14 CARDOZO J.L. & GENDER 609, 691 (2008). The intensity of this treatment often causes transgender youth to get expelled from school, run away from home, or be completely rejected by their families and forced to leave home. *Id.*

ance and/or behavior does not conform to gender norms.¹⁵ This has led to a growing population of homeless, transgender youth who are “exposed to greater victimization while on the streets,” which can lead to drug abuse, prostitution, and other criminal activities.¹⁶ In 2006, the National Gay and Lesbian Task Force completed a comprehensive study of youth and homelessness that found twenty to forty percent of homeless youth are LGBT.¹⁷ Many transgender youth do not apply for college or any other form of higher education “because of fears about having to apply to schools and having their paperwork reveal their old name and birth sex because they have not been able to change these on their documents.”¹⁸

15. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK (GLSEN), THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: EXECUTIVE SUMMARY 3 (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1676-1.PDF (reporting the results of a survey conducted during the course of ten years examining “changes over the past decade on both indicators of negative school climate and levels of access to LGBT-related resources in schools”).

16. Paul A. Toro et al., *Homeless Youth in the United States: Recent Research Findings and Intervention Approaches*, in U.S. DEP’T OF HEALTH AND HUMAN SERVS., NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 4 (2007), available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/toro/report.pdf>. According to this report, LGBT youth are especially in danger of becoming homeless “due to conflict with their family regarding their sexual orientation.” *Id.*; see Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENER RIGHTS 217, 219 (Paisley Currah et al. eds., 2006) (discussing how the inaccessibility of help or community services has a negative effect on transgender youth). Transgender individuals often have a difficult time obtaining benefits and assistance from welfare and workfare programs such as Medicare, Medicaid, and Social Security. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENER RIGHTS 217, 219 (Paisley Currah et al. eds., 2006). This inaccessibility of services leads these individuals to forgo seeking any kind of help at all for fear of humiliating and unfair treatment. *Id.* This leaves many transgender youth homeless and at a high risk for arrest. Symposium Transcript, *Mischief and Mayhem: A Symposium on Legal Issues Affecting Youth in the Child Welfare and Juvenile Justice Systems*, 14 CARDOZO J.L. & GENDER 609, 691 (2008).

17. NAT’L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006), available at http://www.thetaskforce.org/reports_and_research/homeless_youth (highlighting the high rate of homelessness among the LGBT community and consequently the disproportionate share of LGBT people among the national homeless youth population).

18. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENER RIGHTS 217, 219 (Paisley Currah et al. eds., 2006); see NAT’L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 58–59 (2006), available at http://www.thetaskforce.org/reports_and_research/homeless_youth (commenting on the difficulties faced by transgender youth stemming from legal identification issues). Legal identification becomes an issue at some point during the transgender individual’s gender transition period. NAT’L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 58–59 (2006), available at http://www.thetaskforce.org/reports_and_research/homeless_youth. These youth experience dif-

Without guidance, support, and the love of their families as they struggle with their gender identity, many transgender youth suffer from depression and often attempt suicide.¹⁹ One study showed that 41% of male-to-female transgender people attempt suicide and 20% of female-to-male transgender people attempt suicide.²⁰ The difficulty of being an LGBT youth was recently underscored when several youth, who identified themselves as gay, committed suicide while this Article was being prepared for publication.²¹

It is an understatement to say that the experiences of transgender youth are “numerous, scarring, and often have permanent repercussions.”²² And marginalization in their youth is only a precursor to the difficulties these children will face. As adults, “[d]ue to discrimination based on their gender nonconformity, many [transgender people] find it difficult to obtain legal employment or housing, and become trapped in a cycle of poverty, homelessness, and criminalization.”²³ The rights of

ficulty when their appearance, gender, or name does not reflect what one would normally expect based on their original legal identification. *See id.* Although legal identification is presented to be an obstacle, it is not insurmountable. *Id.* at 65.

19. Kristen Clements-Nolle et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51(3) JOURNAL OF HOMOSEXUALITY 53, 63 (2006).

20. Shira Maguen & Jillian C. Shipherd, *Suicide Risk Among Transgender Individuals*, 1 PSYCHOLOGY AND SEXUALITY 34, 34, 39 (2010).

21. Phil Mushnick, *Lessons Unlearned from a Gay Suicide*, NEW YORK POST, October 24, 2010, at 12, *available at* 2010 WLNR 21342330 (noting an 18-year old student at Rutgers University committed suicide after two of his classmates caught him engaging in homosexual activity via a Webcam); John Moore, *Arts Wield the Internet in Battle on Gay Bullying: Pop-culture Powers Unite to Help Stop Teen Suicides*, DENVER POST, October 17, 2010, at E01, *available at* 2010 WLNR 20841916 (acknowledging the names of young teenagers who have recently become part of a “horrific trend of suicides by bullied gay teens”).

22. Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 362 (2007) (discussing the dangers facing transgender youth during their adolescent developmental years). LGBT individuals appear to be disproportionately represented in the homeless youth category. *Id.* A normal distribution would anticipate LGBT individuals to comprise roughly 3–5% of the homeless population. *See id.* It is common for these children to be exiled from their homes by their parents and subsequently find themselves in foster homes or homeless. *Id.*

23. *Id.* (commenting on the many psychological and social challenges experienced by transgender youth); *see* NAT'L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 58–59 (2006), *available at* http://www.thetaskforce.org/reports_and_research/homeless_youth (detailing the path toward ostracism of LGBT youths, first from their families and then from society). Studies suggest that the disassociation of the LGBT community from society begins with the family. NAT'L GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 11 (2006), *available at* http://www.the-taskforce.org/reports_and_research/homeless_youth. Fleeing from their homes, LGBT

transgender adults in the workplace, where adults spend most of their time, have been the focus of much federal case law.²⁴ Conversely, few cases have discussed the rights of transgender youth in schools, where children spend most of their time; there is even less legal scholarship discussing this issue.²⁵

This Article focuses on one of the challenges transgender youth face in the United States—school dress codes.²⁶ Specifically, because transgender youth cannot legally consent to gender reassignment surgery or hormone therapy without their parents' permission, a transgender youth's external appearance often becomes the primary expression of his or her

youth frequently find themselves at the outer fringe of society marked by illicit drug use and unrestrained sexual practices. *Id.* at 22. Their emotional immaturity coupled with relatively few support networks tend to marginalize and incapacitate LGBT youth as members of society. *Id.* at 22–23.

24. See generally *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (recalling the discrimination experienced by a transgender adult by his employer after he voluntarily revealed his gender identity). In *Oiler*, the court examined a Title VII discrimination claim of a transgender male who was fired for dressing like a woman outside of work. *Id.* at *2. The court found the plaintiff did not have a claim under Title VII because it required an employer to discharge someone based on their sex, but here, the employer discharged the plaintiff based on the fact that he took on a female persona outside of work. *Id.* While the court recognized the moral bankruptcy in the decision, it followed precedent and found that Title VII did not cover gender or sexual identity, opining “the function of this Court is not to raise the social conscience of defendant’s upper level management, but to construe the law in accordance with proper statutory construction and judicial precedent.” *Id.* at *6; see *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004) (overturning district court’s decision that Title VII protection against sex stereotyping is unavailable to transgender individuals in an employment discrimination claim). “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.” *Smith*, 378 F.3d at 575. The Sixth Circuit’s decision applied the Supreme Court’s prohibition of sex stereotyping explained in *Price Waterhouse v. Hopkins*, distinguishing numerous employment cases that previously refused to extend Title VII protection to transgender individuals. See *id.* at 572–73; compare *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (denying Title VII protection to transgender people), and *Sommers v. Budget Mktg. Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (refusing to apply Title VII to transgender people on the basis that “sex” is limited to a “traditional definition”), with *Smith*, 378 F.3d at 575 (determining that a transgender plaintiff “has stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination”).

25. See, e.g., Arnold H. Grossman & Anthony R. D’Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 JOURNAL OF HOMOSEXUALITY 111, 113 (2006) (noting the lack of empirical information regarding transgender youth).

26. See generally Jennifer L. Greenblat, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL’Y 281 (2009). The challenges of transgender youth in other countries, for various reasons, differ from the experiences of transgender youth in the United States.

gender identity.²⁷ As a school's dress code can be used to enforce gender norms and prescribe gender conformity,²⁸ these rules become a means by which transgender youths' identities are suppressed and they are further marginalized and silenced. Given the dearth of case law and scholarship discussing this aspect of being transgender, the aim of this Article is two-fold. First, this Article aims to provide a foundation for lawyers who represent transgender students and how these advocates can protect their clients' rights to express their gender identity. Second, this Article aims to provide practical non-litigation strategies that lawyers and educators can utilize to create a safe space for their transgender students and clients. To this end, Part I helps frame this discussion by providing an overview of important transgender terminology. In this section, I focus on the definitions of "transgender" that guide this Article, namely, Phyllis R. Frye's definitions of "part-time" and "full-time" transgender people. Part II examines two cases about transgender youth in schools, *Doe v. Yunits*²⁹ and *Youngblood v. School Board of Hillsborough County*.³⁰ Through these cases, I provide examples of a part-time and a full-time transgender youth challenging dress codes. In Part III, I outline the advantages and disadvantages of two of the legal claims raised in *Yunits* and *Youngblood*—disability and freedom of expression. Finally, in Part Four, I discuss non-litigation strategies that advocates and educators can utilize to create a "safe space" for transgender youth as litigants and as students, as well as how schools can address claims of harassment and bullying with an eye toward preventing and deterring litigation.

II. TERMINOLOGY

Gender identity is often misunderstood. Most people, including judges, lawyers, and legislators, have little to no understanding of transgender terminology.³¹ The absence of a common vernacular forms the

27. See Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 7 (Paisley Currah et al. eds., 2006) (describing various cases in which public schools have punished students for expressing themselves by wearing clothing traditionally worn by members of the gender to which they self-identify).

28. See generally Jennifer L. Greenblat, *Using the Equal Protection Clause Post-VMJ to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281 (2009).

29. No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

30. Complaint for Plaintiff, *Youngblood ex rel. Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla.*, (2002) (No. 8:02-CV-1089-T-24MAP), 2002 WL 32664478.

31. See Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 154–55 (2000) (explaining that "transgender" is the umbrella term encompassing all per-

foundation of poorly written opinions and legislation concerning the rights of transgender people. In this section, I attempt to define the term “transgender” in order to provide a framework for the discussion in this Article and to provide terminology that will, hopefully, provide guidance for people unfamiliar with what it means to be “transgender.” I do so with the understanding that no definition of transgender is complete or perfect and that this term has been profoundly debated within the LGBT community.³²

The Human Rights Campaign (HRC) provides a concise definition of “transgender” as:

A broad range of people who experience and/or express their gender differently from what most people expect—either in terms of expressing a gender that does not match the sex listed on their original birth certificate . . . or physically changing their sex. It is an umbrella term that includes people who are transsexual, cross-dressers, or otherwise gender non-conforming.³³

Although this definition provides for a baseline understanding of what it means to be transgender, Phyllis R. Frye provides a more comprehensive definition that may be more palatable for a judge or jury when advocating on behalf of a transgender litigant.³⁴ Specifically, Frye advocates for the use of a two-part framework to help people understand “trans-

sons whose gender expression clashes with their perceived gender). The common misunderstanding is that transgender individuals are only those that undergo genital reconstruction. *See id.* at n.87. This generalization, however, is incorrect. *Id.* at 154. The transgender community includes many subset groups, such as transsexuals, transvestites, heterosexual cross-dressers, and homosexual cross-dressers. *Id.* The primary characteristics of a transgender are not controlled by genitalia, but rather the conflicts between one’s gender expression, perceived gender, and society’s inability to accept the contradictions. *Id.* at 154 n.89.

32. *See, e.g.,* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 74 (Paisley Currah et al. eds., 2006) (distinguishing the definition of “transgender” as a disability).

33. HUMAN RIGHTS CAMPAIGN, *WORKPLACE GENDER TRANSITION GUIDELINES 2* (2006), available at <http://www.hrc.org/documents/HRC-Workplace-Gender-Transition-Guidelines.pdf> (providing a model employment policy designed to accommodate transgender or gender-transitioning employees). This policy provides uniform definitions of terms and concepts related to transgender or transitional employees in an effort to promote company-wide understanding and respect for transgender co-workers, fostering an accommodative work environment. *Id.*

34. Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. the Cider House Rules: Transgendered Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 153–56 (2000).

gender.”³⁵ While this definition is controversial because it is broad (for example, her definition would include someone who could be considered a “tomboy”), Frye explains, based on her experiences litigating for transgender clients, that “most people, judges and legislators understand transgender people better when discussed from the perspective of transgender individuals being part-timers or full-timers.”³⁶

According to Frye, a “part-time transgender person is often called a cross-dresser, transvestite, effeminate male, masculine female, drag queen, as well as a host of other labels.”³⁷ These people, generally, do not fit into the male/female binary. For example, a woman who wears pants, men’s shirts, no make-up, and short hair is included in this group. Frye explains that a “part-time” woman will learn “[w]ith some social pain and difficulty” that she does not fit neatly into either category, male or female.³⁸ These transgender people are often the claimants of sex-stereotyping and sex discrimination lawsuits, which the Supreme Court addressed in *Price Waterhouse v. Hopkins*.³⁹

In *Price Waterhouse*, a female accounting executive was denied a promotion because she did not fit the profile of a stereotypically feminine woman and, according to at least one of her supervisors, needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁰ The Court explained,

35. *Id.* at 155–60.

36. *Id.* at 155 (footnotes omitted) (providing evidence of Frye’s experience educating judges and lobbying in Texas about transgender rights). Through the author’s experience of representing herself in court during her transition along with other transgender people, Frye has been able to educate many judges on transgender rights. *Id.* at 155 n.90.

37. *Id.* at 156 (discussing the discrimination certain transgender people face). Part-time transgender people would prefer to express their gender through a variety of ways, rather than make a permanent change to their gender. *Id.* at 157. This form of expression is termed by Frye as “gender variance.” *Id.* The part-time transgender person does not coincide with society’s idea of an all-male type or an all-female type. *Id.* “For the part-timer or partial gender crossover person—the cross-dresser, transvestite, effeminate male, masculine female, or drag queen—the prediction of the socially assigned full-time gender is invalid and does not fit.” *Id.*

38. *Id.* at 156.

39. *See* 490 U.S. 228, 235 (1989).

40. *See id.* (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). Sex-stereotyping discrimination in employment can be even more complicated for homosexuals because courts have shied away from recognizing separate standards for sexual orientation and gendered discrimination. *See* Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 1, 14 (2009) (arguing, “[w]ithout gender identity protections, employers could actually use sexual stereotypes as a legitimate non-discriminatory reason to discriminate against an employee”). Weinberg urges courts and legislators to pay close attention to the distinction between “sex” and “gender,” as it has a profound impact on whether or not a plaintiff may recover under a statute such as

the defendant (her employer) would be liable unless it could show a legitimate, non-discriminatory reason for her termination.⁴¹ However, reading the opinion through Frye's lens, it seems her employer made the decision because she is a "part-timer" and did not conform to a gender stereotype.⁴²

The second type of transgender person that Frye describes are people who are "full-time" or what many refer to as transsexual.⁴³ Full-timers are different from the part-timers because they:

[M]ust always and fully correct the socially assigned gender role—and possibly their anatomy, which initially dictated their socially assigned gender role—in order to function in accordance with their brains' gender identity. This need to correct the gender is labeled "gender dysphoria,"⁴⁴

Title VII. *Id.* at 1–2. She explains further, "[s]ex is now understood as merely the biological underpinnings of an individual, while gender is the societal expectation of what it means to be male or female." *Id.* at 2.

41. *Price Waterhouse*, 490 U.S. at 252–53 (articulating the defendants' burden of proof to demonstrate by a preponderance of the evidence they would have made the same decision if Hopkins was a man instead of a woman). An expert witness testified to the fact that the hiring process at Price Waterhouse "was likely influenced by sex stereotyping." *Id.* at 235. The Court aptly pointed out, however:

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to [Hopkins' supervisor's] memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.

Id. at 256.

42. *See id.* at 235 (citing *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). A person's gender identity falls somewhere between the epitome of a woman, with all the stereotypical traits one would generally attribute to the prototypical feminine woman, and the epitome of a man, with all the traits one would assign to a prototypical masculine man. *See* Jody Lynsee Madeira, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interest in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 139 (2002). People generally fall somewhere between the two extremes and exhibit their gender identity outwardly. *See id.* Confusion in society often arises when someone's gender identity goes against the characteristics normally ascribed to their biological sex. *Id.*

43. *See* Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 158–61 (2000) (explaining the differences between full-time and part-time transgender people).

44. *Id.* at 159 (discussing the purpose and difficulties of making a complete gender transition). Frye asserts that one's gender identity develops before birth. *Id.* at 162. It is important to note that the term "gender dysphoria" carries a highly pejorative connotation

Most full-time transgender people typically undergo a “transformation” process involving a series of stages from the moment they realize they are transgender to the point in their lives where there is no longer a conflict between mind and body with respect to their *biological sex* and their *gender identity*.⁴⁵ At first, it is common for people to change their outward appearance by wearing clothing more closely aligned with society’s expectations of their desired gender.⁴⁶ Many transgender people find it helpful to seek the support of group and individual counseling at this stage in their transition.⁴⁷ Those who elect to undergo gender reas-

within the transgender community. *Id.* at 159. Frye asserts a transgender person is not dissatisfied with his or her gender, but rather interested in conforming his or her physical appearance to match one’s *already formed* gender identity in the brain. *Id.*

45. See JANET SHIBLEY HYDE & JOHN D. DELAMATER, UNDERSTANDING HUMAN SEXUALITY 351–53 (Emily Barrosse et al. eds., 9th ed. 2006) (expanding upon the process a transgender individual goes through in changing his or her sex). The process itself is known by several names, including gender reassignment, sex change, or gender transition. *Id.* at 351. A male-to-female process is generally considered easier than a female-to-male process, as the last stage, surgery, is more complicated for female-to-male transgender. *Id.* at 350, 353. If the transgender individual undergoes surgery, it is essential that he or she be fully committed to the process because once completed, the procedure is irreversible. *Id.* at 351; Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133 (2000) (detailing the various ways transgender people experience the gender transition process). The transition for a full-timer requires physiologically altering hormones, which have irreversible effects. *Id.* at 160. Often, some people also endure “electrolysis, voice therapy, tracheal shave, breast reduction surgery, scalp hair transplant, breast [augmentation] surgery, hysterectomy, orchiectomy or metaoi-dioplasty.” *Id.* at 161. Regardless of whether the transition continues into genital alteration surgery, the full-timer is now considered a complete transgender individual. *Id.*

46. See JULIA SERANO, WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 299–304 (2007) (providing a personal account as to the various phases of “cross-dressing” transgender individuals typically experience). Serano mentioned three phases of cross-dressing she went through: clothing, public, and interactive. *Id.* The first phase, the “clothing phase,” consists of “trying on individual articles of clothing one at a time” eventually leading to an appearance with which the individual is comfortable. *Id.* at 299–300. Next, the “public phase” involves venturing out into public while being recognized by others as the gender one desires. *Id.* at 300. Serano discussed her experience with this phase and the element of fear she had at the thought of being a victim of violence by those who would find out and judge her. *Id.* at 300–01. After a transgender individual becomes comfortable with appearing in public, he or she will likely enter the third phase of cross-dressing—the “interactive phase”—where the transgender individual goes out with friends while cross-dressing. *Id.* at 303–04.

47. *Id.* at 301 (detailing how the author, a male-to-female transgender individual, sought the comfort of “crossdresser support and social group meetings” during the “public phase” of her gender transition); see also JANET SHIBLEY HYDE & JOHN D. DELAMATER, UNDERSTANDING HUMAN SEXUALITY 351 (Emily Barrosse et al. eds., 9th ed. 2006)

signment surgery will almost always be required to go through intensive counseling prior to making such a life-altering and often irreversible decision.⁴⁸ After committing to gender reassignment surgery, sometimes referred to as “gender transition,” many transgender people begin hormone therapy that will give them the physical appearance of their desired gender.⁴⁹ For example, female-to-male transgender people may take hormones to increase their facial and body hair.⁵⁰ Finally, some undergo complete gender reassignment surgery—an expensive, invasive, and physically painful undertaking.⁵¹

(stressing the importance of “establish[ing] that the person is a true transsexual, that is, someone whose gender identity does not match her body type” prior to undergoing gender reassignment surgery).

48. JANET SHIBLEY HYDE & JOHN D. DELAMATER, *UNDERSTANDING HUMAN SEXUALITY* 351 (Emily Barrosse et al. eds., 9th ed. 2006).

49. *See id.* at 351–52 (identifying the different hormones prescribed to male-to-female and female-to-male transgender individuals and the varying effects the hormone therapy has on their bodies). Male-to-female transgender individuals must receive hormone treatment therapy for the rest of their lives, and although not expressly mentioned, this likely includes female-to-male transgender individuals as well. *Id.* at 351.

50. JAMISON GREEN, *BECOMING A VISIBLE MAN* 98 (2004) (recognizing the various effects a female-to-male transgender individual may experience during hormone therapy). Green, with the help of friends and doctors, underwent the female-to-male process. *Id.* By taking testosterone, as part of the hormone therapy, the author remarks that it “balanced my emotions and allowed me to feel at home in my body.” *Id.* at 95. Specifically, in addition to more facial and body hair, some other physical changes include voice deepening, receding hairline, more muscle, different body odor, skin texture, (perceived) increased body temperature, increased clitoris size, increased sex drive, and even a changed facial bone structure. *Id.* at 98. However, these changes in the body as well as the extent to which they occur vary from person to person; one’s body must have certain receptors or there will be no effect at all. *Id.* at 101. For example, there may be instances where one individual who takes testosterone may experience baldness, where another does not. *Id.* Male-to-female transgender individuals receive estrogen, which causes various physical changes including: breast enlargement, hip rounding, the cessation of balding if it is occurring, fewer erections, and diminished or no ejaculate. *Id.* at 351. Female-to-male transgender individuals are prescribed androgens, which typically cause facial hair growth, voice deepening, and clitoris enlargement. *Id.* at 351–52.

51. *See* JANET SHIBLEY HYDE & JOHN D. DELAMATER, *UNDERSTANDING HUMAN SEXUALITY* 353 (Emily Barrosse et al. eds. 9th ed. 2006) (describing the surgeries both male-to-female and female-to-male transgender individuals may receive). Male-to-female surgeries involve removing the penis and testes, while simultaneously constructing an artificial vagina using a portion of the removed penis. *Id.* Female-to-male surgeries, while less frequent and more prone to complication, consist of using tissue from the forearm and the genital area to construct a penis. *Id.* This artificial penis is incapable of an erection without the aid of a silicone tube implant. *Id.* As an alternative to genital reconstruction, other surgeries that may be performed for transgender individuals include: breast augmentation or removal, a hysterectomy, and the reduction of the Adam’s apple. *Id.*; *see also* JAMISON GREEN, *BECOMING A VISIBLE MAN* 102–03 (2004) (explaining the female-to-male surgery in terms of “top” surgery and “bottom” surgery). “Top” surgery includes breast removal

Full-time transgender litigants, particularly those who undergo gender reassignment surgery, are often the most misunderstood. For example, in *Ulane v. Eastern Airlines*,⁵² the Seventh Circuit explained that a post-operative (or post gender reassignment surgery) transgender woman's Title VII sex discrimination claim was invalid because "it is unlawful to discriminate against women because they are [biologically] women and against men because they are [biologically] men," not because a person is transgender.⁵³ In this case, the court interpreted Title VII's use of "sex" to refer to the genitalia Ulane had at birth instead of genitalia that she had after gender reassignment surgery.⁵⁴ These types of distinctions have made it increasingly difficult for transgender people to protect themselves from discrimination, harassment, and general mistreatment.

Transgender youth are at an even greater disadvantage than adult litigants. Young people who are transgender are unable to complete the full

and a reshaping of the chest, while "bottom" surgery focuses on removing the female reproductive organs as well as reconstruction of the genital area. JAMISON GREEN, *BECOMING A VISIBLE MAN* 102 (2004). Green discusses several factors a transgender individual must consider in deciding on surgery, including time and money spent. *Id.* A transgender individual should realize the transformation process will take years, costing upwards of "tens of thousands of dollars." *Id.* In addition, a transgender individual must realize that the surgery itself is a true transformation of the body, and that the decision to undergo surgery must be a well-informed one, characterized by an honest conversation with a surgeon as to what is expected and what is possible. *Id.* at 102–03.

52. 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (overturning district court's decision that extended Title VII protection to transgender individuals).

53. *Id.* (emphasizing the plain meaning of "sex" in Title VII does not extend to an individual's sexual identity). "[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born." *Id.* The Seventh Circuit took a narrow view on the plain meaning of "sex" as defined in Title VII. *See id.* Recently, a broader view that encompasses sexual identity as a basis for Title VII protection for GID has emerged in other circuits. *See Smith v. City of Salem*, 378 F.3d 566, 571–72 (6th Cir. 2004) (adopting Title VII protection on the basis of sex-stereotyping analysis advocated in *Price Waterhouse*). Additionally, the Seventh Circuit reasoned that if the 1964 Congress had intended "broad coverage of homosexuals, transvestites, or transsexuals" then the legislative history would have mentioned it and "would have no doubt sparked an interesting debate." *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984). "While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals." *Id.* The Seventh Circuit determined that the plain language of "sex" controlled the application of Title VII and limited protection from including "the untraditional and unusual within the term 'sex' as used in Title VII." *Id.* at 1085–86.

54. *Ulane*, 742 F.2d at 1087 ("It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.") (footnote omitted).

gender transition process until adulthood because they are either too young to consent to or are unable to safely undergo gender reassignment surgery or hormone therapy.⁵⁵ Furthermore, any effort to cope with their gender identity, in the meantime, is severely hindered by teachers, counselors, and administrators who are not normally able to understand or appreciate the emotional and physical difficulties transgender students experience.⁵⁶ Often, a transgender youth's only option is to wear clothes, make-up, or accessories to reflect their true gender identity—a right which is threatened by the traditional dress code policies found in many primary and secondary schools.⁵⁷ In the following section, I summarize two separate legal challenges to school dress codes where the plaintiffs serve as examples of “part-time” and “full-time” transgender youth.

III. TRANSGENDER YOUTH AND CASE LAW

Transgender youths' ability to pursue gender reassignment surgery and/or hormone therapy is significantly hindered by several legal hurdles—in many states, the youth's consent is irrelevant, even if they have parental support in this decision.⁵⁸ Because a transgender youth's biological sex may not accurately express the youth's gender identity, the youth often

55. Sonja Shield, *The Doctor Won't See You Now: Rights of Transgendered Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 406 (2007) (“Transgender minors who seek sex reassignment treatment must have their parents or guardians consent on their behalf, or may be able to resort to the courts to overturn a parent or guardian's veto.”). Shield advocates for the right of transgender minors to begin sex reassignment at an early age “where clinically appropriate” due to the many hormonal changes experienced by adolescents, which can complicate the transition process later in life. *Id.* at 378.

56. Often, individuals will dismiss a transgender student's nonconforming behavior as “mere whimsy.” Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 12 (Paisley Currah et al eds., 2006).

57. *Id.* at 7 (“That schools are central to reproducing hegemonic cultural norms is made clear by the courts in the many decisions supporting gender-based dress codes in schools.”).

58. Amanda Kennedy, Comment, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281, 290 (2008) (detailing the social and legal difficulties of transgender youth in the pursuit of medical procedures to re-assign gender). The optimal scenario is one in which the transgender youth has the full support of both parents, because parents are generally able to consent to the procedure(s) on behalf of the minor. *Id.* at 288. However, this general statement is almost too simplistic, because the law is far from uniform in regard to a minor seeking gender re-assignment therapies or surgeries. *Id.* at 290–92. The inconsistencies may be a result of a general lack of specific statutory provisions and/or of on point case law, all of which is further complicated by a public policy goal of acting (or not acting) in the best interests of children. *See id.* at 291–94. For example, this issue implicates one's right to privacy and a parent's constitutionally protected right to “exercise control over their children.” *Id.* at 291. Adding to the confusion is the partial availability of “mature

relies on gender expression through clothing and other external indicators.⁵⁹ Thus, the harassment, discrimination, and violence that these children experience is typically the result of their appearance, which often does not conform to gender norms or to a school's dress code.⁶⁰ Therefore, case law involving transgender students' rights centers on challenges to school dress codes. Below I discuss two of these cases.

A. *Doe v. Yunits*

In *Doe v. Yunits*, a fifteen-year-old male-to-female "full-time" transgender student attended school wearing "female" clothing.⁶¹ On several

minor" standards—which may be invoked only upon some condition, and the condition(s) necessary to trigger this possible remedy also vary from state to state. *Id.* at 292–93.

59. Complaint for Plaintiff, Youngblood *ex rel.* Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla., No. 8:02-CV-1089-T-24MAP, at *8 (M.D. Fla. Sept. 25, 2002) (exemplifying a youth's struggle with expressing herself through her stereotypically male clothing choices); see Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 7 (Paisley Currah, et al. eds., 2006) (explaining various causes of action and the legal basis for the plaintiffs' denial of or grant of remedies). Currah contrasts two cases with similar facts but different legal arguments, which she surmises to be the basis for the difference in plaintiffs' success or defeat in court. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 7–12 (Paisley Currah et al. eds., 2006). In *Doe v. Yunits*, the plaintiff was afforded relief because she successfully argued and brought evidence forth that her gender identity disorder requires her to express her identity through her clothing and appearance. *Id.* at 8–9. The court likened the school's act of "constructive expulsion" to a school requiring a certain height for students or to a school's prohibition of treatment for a diabetic student. *Id.* at 9–10.

60. See, e.g., *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000). In this case, the junior high school dress code prohibited "clothing which could be disruptive to the educational process or which could affect the safety of students." *Id.*

61. *Id.* at *1–2 (examining whether a student who was born male, but whose gender identity is female, should be allowed to wear feminine clothes so long as it is not disruptive to the education of other students). The student claimed the school violated her right to freedom of expression, to attend public school, to dress and appear as she wanted, and to not be discriminated against based on sex. *Id.* at *2. She was able to prove the defendants' allegation that she disrupted class with her dress did not overcome the right she had to dress the way she wanted. *Id.* at *5–6. In fact, Doe's treating therapist determined her dressing in accordance with the female gender was necessary for Doe's psychological well-being. *Id.* at *1. The court held that it could not "allow the stifling of plaintiff's selfhood merely because it cause[d] some members of the community discomfort." *Id.* at *7. While the school claimed the plaintiff's expression of her gender identity distracted the educational process, the court held that while the school dress code was gender-neutral, it was applied in a manner that was likely discriminatory. *Id.* at *7. Further, the court declared the school could only discipline students if their attire would be offensive or inappropriate if other students, who were not transgender, wore the same clothes. *Id.* at *5. "[T]his court trusts that exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience in that 'Brave New World' out there." *Id.* at *8.

occasions, the school administration sent Doe home because of her “female” attire.⁶² Ultimately, Doe was told she could not return to school the following year unless she adhered to the administration’s demand that she wear “male” attire.⁶³ Subsequently, Doe filed three claims against her school—sex discrimination, freedom of expression, and disability.⁶⁴

First, Doe argued that her gender identity disorder (GID)⁶⁵ was a disability.⁶⁶ “Because her GID [was] ‘the basis of her need and desire to dress and appear [like a woman], the school [was] discriminat[ing] against her because of her disability.’”⁶⁷ Second, Doe filed a sex discrimination claim arguing “there was no compelling interest for the school principal ‘to prohibit a transgender student who was ascribed the sex of male at birth from wearing clothing that would be unobjectionable if worn by a girl.’”⁶⁸ Finally, Doe claimed the school infringed upon her freedom of

62. *Id.* at *1 (prohibiting a student from wearing girls’ apparel and sending her home on most occasions to change).

63. *Id.* at *2 (claiming that Doe’s wardrobe choices were disruptive and impeded the other students’ education process). The school alleged that her clothes were disruptive and they sought to use evidence where threats had been made against the plaintiff by students who wanted “to beat up the ‘boy who dressed like a girl.’” *Id.* at *5. The court held that the public interest will not be harmed by granting the injunction to let her back in the school and that the school will be allowed to discipline Doe for attire that is actually disruptive and for inappropriate behavior. *Id.* at *8.

64. *Id.* at *1.

65. Gender identity disorder is a “strong cross-gender identification and a general discomfort with one’s assigned sex, as usually is biologically determined.” HANDBOOK OF SEXUAL AND GENDER IDENTITY DISORDERS xvii (David L. Worland & Luca Incrocci, eds., 2008).

66. *Yunits*, 2000 WL 33162199, at *1, *7.

67. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 3, 8 (Paisley Currah et al. eds., 2006) (discussing two cases where individuals struggled with their gender identity and expression). Dr. Hazel Beh and Dr. Milton Diamond use the definition from the Diagnostic and Statistics Manual to define GID as “[a] strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex).” Hazel Beh & Milton Diamond, *Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia*, 15 HEALTH MATRIX J. L. MED. 239, 258 n.97 (2005). Furthermore, a person with GID may exhibit “[p]ersistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.” *Id.* at 259 n.97. The disorder “is not concurrent with a physical intersex condition,” and may cause “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.*

68. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 3, 9 (Paisley Currah et al. eds., 2006) (articulating one of Doe’s stronger arguments). In response to Doe’s sex discrimination claim, the defendants argued that the rule was gender-neutral since a female would receive the same treatment if she were to wear “distracting items of men’s clothing.” *Yunits*, 2000 WL 33162199, at *6. However, the court determined that argument failed to properly frame the issue. *Id.* Instead, the court

expression rights because her attire was an expression of her core identity.⁶⁹

A Massachusetts district court held that Doe's school discriminated against her because she identified with the female gender and other female students would not be treated the same way if they were wearing the same attire as Doe.⁷⁰ Finally, the court did not reach Doe's freedom of expression claim because she dropped the claim before it went to trial.⁷¹ However, the court held that Doe's GID disability claim was invalid because, although Massachusetts disability rights law did *not* explicitly exclude GID, the state's federal counterpart—the Americans with Disabilities Act (ADA)—did explicitly exclude GID.⁷²

The court's analysis in *Yunits* is distinctive because the court moved beyond rigid discussions of biological sex and, instead, accepted Doe's "self-identified gender . . . and proceed[ed] to analyze the case from [her] perspective."⁷³ However, this case is only binding in Massachusetts and no other case has followed the Massachusetts court's analysis.

reasoned, "the right question is whether a *female student* would be disciplined for wearing items of clothes plaintiff chooses to wear." *Id.* (emphasis added).

69. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 3, 9 (Paisley Currah et al eds., 2006). A Massachusetts court visited the idea of GID and medical necessity when a prison inmate brought an action against a prison requesting an injunction to require the prison to treat him for GID. *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 156 (D. Mass. 2002). Although the court conceded that GID "is a rare, medically recognized, major mental illness," it denied the request for an injunction. *Id.* at 184. The court acknowledged that GID has "differing degrees of severity" but reasoned that because "some individuals" manage their GID themselves, there is no Eighth Amendment entitlement to treatment. *Id.*

70. *Yunits*, 2000 WL 33162199, at *5. The *Yunits* court maintained that apparel that causes a disruption, such as theatrical costumes, should be distinguished from gender-specific apparel that would be acceptable under a school dress code. *Id.* at *5.

71. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 3, 9 (Paisley Currah et al. eds., 2006).

72. See *Yunits*, 2000 WL 33162199, at *7 (explaining how state laws are capable of providing greater protection than their federal counterparts). Massachusetts law aligns with federal law, at least to the extent that GID is omitted as a protected disability. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12211(b)(1), 12102 (2006). Despite specifically excluding "gender identity disorders not resulting from physical impairments," the Americans with Disabilities Act defines disability as an "impairment that substantially limits one or more major life activities," where "activities" includes learning, reading, and concentrating—precisely the kind of lifestyle interference regularly experienced by transgender youth in academic environments. §§ 12211(b)(1), 12102(1)(A), (2)(A).

73. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 310 (2005) (advocating for the use of the self-identified gender approach as a more equitable replacement to the sex-gender distinction). The author believes "[o]ne of the most harmful underlying concepts that courts use is the distinction between sex and gender." *Id.* at 262. Some consider a transgender person's self-identifica-

B. *Youngblood v. School Board of Hillsborough County*

In *Youngblood*, Nikki Youngblood, a seventeen-year-old high school student and a female “part-time” transgender youth, preferred to wear “boys” clothing and had done so since she was a little girl.⁷⁴ When Youngblood came to school “for her senior yearbook portrait in 2001 wearing a shirt and tie, she was told . . . that she could not have her picture taken unless she complied with the school’s yearbook dress-code policy, which required all girls to wear a revealing, velvetlike, scoopneck [sic] drape for their portraits.”⁷⁵ Boys, on the other hand, “were required to wear a white shirt, tie, and dark jacket.”⁷⁶ Youngblood and her mother spoke with an assistant principal and member of the school board to get permission for Youngblood to wear the boy’s shirt and tie for her photo, but were told if she did not wear the drape, she could not take her senior portrait.⁷⁷ Because of the controversy surrounding her yearbook

tion test to determine sex as “less real” than a biological test, which assigns sex at birth. *Id.* Courts view the biological test as the ultimate truth and a transgender person would have the burden of providing expert medical testimony to refute the results of the biological test. *Id.* at 262. Eliminating the use of this sex-gender distinction would provide greater court protection to transgender people. *Id.* at 262–63. Additionally, the sex-gender distinction often elicits life-threatening violence from individuals who believe transgender people intentionally keep their sex a secret. *Id.* at 263.

74. *Youngblood ex rel. Youngblood v. Sch. Bd. of Hillsborough Cnty.*, Case No. 8:02-CV-1089-T-24MAP, at *6 (M.D. Fla. Sept. 25, 2002). See Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 35 (2006).

75. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 3, 7 (Paisley Currah et al. eds., 2006); see also *McClung v. Bd. of Educ.*, No. CA-75-5, 1975 WL 182196, at *3 (Ohio App. Dist. July 9, 1975) (reversing the decision of the lower court, determining that “the regulation of the length of hair for boys and not for girls is not reasonably necessary to maintain discipline or to operate a public school”). After an Ohio school refused to put a student’s picture in the yearbook for failing to conform to the school’s policy on hair style, the student brought an action seeking an injunction to include his photo. *Id.* at *1. The Ohio court of appeals granted an injunction “until [the student’s] photograph is included in the yearbook.” *Id.* at *4.

76. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANS-GENDER RIGHTS 7 (Paisley Currah et al. eds., 2006).

77. See Telephone Interview by GenderPAC Nat’l News with Nikki Youngblood (July 1, 2002), <http://groups.yahoo.com/group/transgendernews/message/573> (detailing the events that lead to a gender-discrimination suit against Robinson High School in Tampa). Nikki Youngblood described the shock she experienced when she was told she could not wear a suit and tie for her high school yearbook picture. *Id.* The school’s solution to the problem consisted of Youngblood paying \$200 to have a picture of her in a suit and tie included at the back of the yearbook with the advertisements. *Id.* Youngblood, with the support of the Equality Florida Legal Advocacy Project, attested to the importance of gender expression by choosing to fight against the school’s policy. *Id.*

attire, Youngblood did not have time to take her picture before the deadline and her picture and name were excluded from the yearbook.⁷⁸

As a result, Youngblood filed suit claiming her school district discriminated against her on the basis of sex and infringed upon her freedom of expression.⁷⁹ The focus of the sex discrimination claim was the harm caused by gender stereotyping.⁸⁰ Youngblood's lawyers argued that the "frilly drape to be worn in the portrait . . . furthered the 'invidious and debilitating stereotype that girls are or should be delicate, submissive, and passive.'"⁸¹ The court dismissed the sex discrimination claim because, it explained, Youngblood's double-faceted argument seemed contradictory.⁸² The court thought plaintiff's problem would be remedied if the school allowed women to wear senior portrait attire that was less "feminine."⁸³ To the court, the relief sought did not align with the plaintiff's argument that "she should be allowed to dress in *male* attire for senior portraits because she has not worn a dress, skirt, or other traditionally female clothing since she was in first or second grade."⁸⁴ The claim seemed to conflate the effect of the drape on all women and on Youngblood's notion of her gender identity, which confused the court.⁸⁵

Youngblood's second claim, freedom of expression, relied on the two-part *Tinker v. Des Moines School District*⁸⁶ test which determines free

78. *Id.* (discussing the circumstances that inspired a high-school senior to file a gender-discrimination suit against her school).

79. See Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 10 (Paisley Currah et al eds., 2006) (discussing the facts surrounding Youngblood's suit for sexual discrimination and freedom of expression). The Supreme Court routinely holds that simple expressive conduct is not afforded free speech protection just because someone labels it as "speech"; instead there must be at least a "particularized message" and the ability for that message to be understood without further discussion. See *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) ("attempting to communicate [] a 'vague or unfocused' message is afforded minimal if any First Amendment protection."). In order to state an acceptable cause of action for sexual discrimination, a plaintiff is required to demonstrate there was *purposeful* discrimination—not that the discrimination was simply a byproduct of the policy. See *id.* at 323 (citing *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)) (stating that there must be "purposeful discrimination" to invoke protection of the First Amendment).

80. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 10 (Paisley Currah et al. eds., 2006).

81. *Id.* (illustrating how Youngblood refused to conform to typical gender stereotypes).

82. *Id.* at 11.

83. *Id.*

84. *Id.* (emphasis added).

85. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 11 (Paisley Currah et al. eds., 2006).

86. 393 U.S. 503 (1969) (holding a student's right to freedom of expression is protected on a school campus unless it "materially and substantially interferes" with the learn-

speech rights in a school setting.⁸⁷ Youngblood argued, first, that her “desire to wear a shirt and tie in her photo intended to send a particularized message” to her school that women do not have to conform to gender stereotypes.⁸⁸ Second, she argued “there was a reasonable likelihood that her message would be understood by others.”⁸⁹ Relying on *Karr v. Schmidt*, a Fifth Circuit case upholding the constitutionality of a school policy requiring boys to have short hair,⁹⁰ the court found that the school’s portrait dress code “required ‘even less justification than a school requiring hair to be cut, which affects students twenty-four hours a day, seven days a week, nine months a year.’”⁹¹ The court subsequently dismissed the freedom of expression claim.⁹² Eventually, the administration and Youngblood settled and the administration agreed to stop “requiring girls to wear drapes for their senior portraits.”⁹³

Yunits and *Youngblood* are distinctive because both cases draw attention to “the existence of gender nonconforming youth, expanding the social imaginary about different gender [expressions and] possibilities.”⁹⁴ These cases illustrate the ways in which seemingly comparable claims,

ing environment). First Amendment rights extend to both students and teachers on all parts of campus, not just the classroom. *Id.* at 506. This freedom is fundamental to educate students on the principles of our government. *Id.* at 507. The school authorities’ fear of disturbance alone is not sufficient to defeat the “right to freedom of expression.” *Id.* at 508.

87. Complaint for Plaintiff, Youngblood *ex rel.* Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla., (2002) (No. 8:02-CV-1089-T-24MAP), 2002 WL 32664478, at ¶ 11.

88. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS-GENDER RIGHTS* 3, 10–11 (Paisley Currah et al. eds., 2006) (identifying the underlying intentions of Youngblood’s actions). Failure to demonstrate intent to send a particularized message will typically indicate that the activity is not protected under First Amendment. *See Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389–90 (6th Cir. 2005) (discussing the application of the First Amendment to self-expression through clothing). The purpose of the First Amendment is not to provide 12-year-olds with the ability to choose their own clothes, but rather protect any message intentionally conveyed by wearing the clothes. *Id.* at 390.

89. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS-GENDER RIGHTS* 3, 10–11 (Paisley Currah et al. eds., 2006) (characterizing the message Youngblood sought to convey by her actions).

90. *Karr v. Schmidt*, 460 F.2d 609, 614 (5th Cir. 1972).

91. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS-GENDER RIGHTS* 3, 11 (Paisley Currah et al. eds., 2006) (discussing relevant dress code policies and their possible infringement on transgender rights).

92. *See id.*

93. *Id.* at 12 (asserting that Youngblood’s case was a victory for the transgender rights movement).

94. *Id.* (discussing the potential public implications resulting from Youngblood’s lawsuit).

like *Yunits* and *Youngblood*, can be decided differently,⁹⁵ in addition to illustrating the various claims that transgender youth can potentially file. In the following section, I explore disability and freedom of expression as possible avenues for protecting transgender youth's rights, as well as their advantages and disadvantages.

IV. POTENTIAL CLAIMS

A. Disability

As illustrated in *Yunits*, disability law is an avenue to protect the rights of transgender students.⁹⁶ Though transgender people are blocked from almost all forms of federal disability claims including the ADA,⁹⁷ the Rehabilitation Act,⁹⁸ and for transgender youth specifically, the Individuals with Disabilities Education Act (IDEA) Amendments of 1997 that created protection for children with special needs in all fifty states,⁹⁹ "many state (and local) laws contain no such express exclusion and have been used successfully by transgender litigants."¹⁰⁰ These states have interpreted their disability laws to include discrimination against transgender

95. *Id.* at 13 (addressing the inconsistencies in judicial decisions addressing gender identity). As Currah observes, "this body of law is riddled with contradictions; the notion that there is some hidden analytic key that, when discovered, will reveal the law's underlying logic assumes an ideological coherence that is just not there." *Id.*

96. *Doe ex rel Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *7 (Mass. Super. Ct. Oct. 11, 2000).

97. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (2006).

98. Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. (2006).

99. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (2006).

100. See Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 104 n.81 (2006) (citing various circuit courts that have recognized disability protection for transgender litigants). Employment discrimination against transgender people is currently forbidden in thirteen states and the District of Columbia. See *Non-Discrimination Laws*, TRANSGENDER LAW & POLICY INSTITUTE, <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last updated Feb. 17, 2010) (listing jurisdictions with nondiscrimination laws explicitly including transgender people); see also NAT'L CNTR FOR LESBIAN RIGHTS, *Federal Cases Addressing Whether Discrimination on the Basis of Gender Non-Conformity and/or Transgender Status is a Form of Discrimination on the Basis of Sex* (2009), http://www.nclrights.org/site/DocServer/Federal_Cases_Addressing_Whether_Discrimination_on_the_B.pdf?docID=3661 (providing a comprehensive list of U.S. Supreme Court, circuit courts, and district courts decisions addressing whether transgender discrimination is a form of sex discrimination). Many cities and counties also have laws covering sexual orientation and gender identity. See *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/workplace/equal_opportunity/gender-identity-city-county-laws.htm (last updated Jan. 3, 2011). The ADA, and the Federal Rehabilitation Act of 1973 expressly excludes transgender litigants. The ADA expressly notes that, "the term 'disability' . . . shall not include—transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorder not resulting from physical impairments, or other sexual

people.¹⁰¹ In the following section, I provide a brief overview of two theories of disability that have been used in state claims protecting the rights of transgender people before explaining the advantages and disadvantages of disability theory.

1. Physical Handicap

Pursuant to the first disability theory, transgender people have a physical handicap because of GID.¹⁰² *Lie v. Sky Publishing Corporation*¹⁰³ provides an example of how the physical handicap theory can be argued. In *Lie*, a Massachusetts court held that a transgender employee established a *prima facie* case of transgender discrimination on the basis of a handicap because GID is a condition “which substantially limits one or more major life activities of a [transgender] person.”¹⁰⁴ To interpret the

behavior disorders.” *Id.*; see Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(b)(1) (2006) (amendment taking effect January 1, 2009).

101. See *Jette v. Honey Farms Mini Mkt.*, 2001 WL 1602799, at *3 (Mass. Comm’n Against Disc. 2001) (interpreting a Massachusetts discrimination statute as providing protection for transgender people). Massachusetts’s statute mirroring the Rehabilitation Act of 1973 does not exclude transgender individuals from disability protection, but does not explicitly include it either. *Id.* at *2. However, Massachusetts courts have read the statute to protect transgender individuals. *Id.* at *3; *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001) (protecting transgender individuals under New Jersey discrimination statute); *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882, at *14 (Fla. Div. Admin. Hrgs. Oct. 2, 1991) (holding that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, including the portions of the Act prohibiting discrimination based on perceived disability). *Smith* filed a claim of employment “discrimination based on sex and handicap.” *Smith*, 1991 WL 833882, at *1. Florida’s Division of Administrative Hearings defined handicap as a condition that impairs normal functioning in some manner and contributes to limiting a handicapped individual’s ability to enjoying the full use of their faculties. *Id.* at *11. Gender dysphoria was considered a handicap based on basic reasoning that handicap discrimination laws “ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.” *Id.* at *14 (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987)); *Evans v. Hamburger Hamlet & Fomcreek*, 1996 WL 941676, at *9 (Chi. Com. Hum. Rel. 1996) (denying the defendant’s motion to dismiss a disability claim brought by a transgender plaintiff).

102. *Doe ex rel Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *7 (Mass. Super. Ct. Oct. 11, 2000); Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 74 (Paisley Currah et al. eds., 2006).

103. 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002) (advocating for the physical handicap view of transgender disability). Robert Lie, a male-to-female transgender, was terminated by her employer, Sky Publishing Corporation, on July 24, 1998 based on her transgender status. *Id.* at *2.

104. *Id.* at *6 (enumerating the requirements that must be met in order to meet the statutory definition of handicap). The court in *Lie* eschewed the current federal definition of handicap, which specifically excludes transgender individuals, in favor of one based on

Massachusetts statute, the court noted GID was listed in the American Psychiatric Association's diagnostic manual in support of the argument that people with GID "need [] ongoing medical care in the form of psychotherapy and hormone treatments" to function on a daily basis.¹⁰⁵ The court also noted that the underlying policy behind the statute was to protect individuals from "deprivations based on prejudices, stereotypes, or unfounded fear."¹⁰⁶ Because "transsexuals have a classically stigmatizing condition that sometimes elicits reactions based solely on prejudices, stereotypes, or unfounded fear," the court determined they have a handicap warranting protection under the statute.¹⁰⁷ The handicap theory of disability is an option for transgender students.

In order to bring this type of claim, first an advocate would have to locate a state statute that has a broad definition of handicap discrimination that does not specifically exclude transgender people. Second, the claim would have to include substantial evidence that on a daily basis GID inhibited the life a transgender youth to the point that it could be considered a handicap. Because many transgender youth are not at the transitioning point where they would take hormones, a handicap may be hard to establish. This issue will be discussed in more detail later in this Article.

its own state statutory scheme, stating: "[Massachusetts] is certainly not bound to follow wherever Washington leads." *Id.*

105. *Id.* (identifying the substantial limitation present in transgender individuals for the purpose of being classified as handicapped under the Massachusetts statutory scheme). The court in *Lie* supplied several different options for the classification of transgender individuals as handicapped under the Massachusetts statutory scheme. *Id.* First, GID, as defined by the American Psychiatric Association, could be classified as a substantially limiting impairment. *Id.* Second, the mere fact that the individual needs ongoing care could be considered substantially limiting. *Id.* Finally, the court asserted that "whether an individual's gender identity is characterized as psychological, neurological, or endocrinological, it is certainly a health condition for some transsexuals," and therefore is considered substantially limiting. *Id.*

106. *Id.* at *7 (citing *Cox v. New England Tel. & Tel. Co.*, 414 Mass 375, 383–84 (1993)). The plaintiff in *Lie* asserted that she was fired due to the fact that "the defendant regarded her as having a handicap rendering her incapable of performing her job, despite her abilities and capacity." *Id.* at *7.

107. *Id.* (supporting the assertion that the plaintiff presented a *prima facie* case for discrimination under the state statutory scheme). The court, in recognizing the hardship caused by the social stigma placed upon transgender people, accepted plaintiff's argument that society's treatment of transgender individuals in and of itself determined that it could be considered a handicap. *Id.*

2. Mental Disorder

A transgender student may also find protection using the “mental disorder” theory in their disability claim. In *Conway v. City of Hartford*,¹⁰⁸ the court found that being transgender was not a physical handicap or disability under Connecticut law, but the facts of the plaintiff’s case supported a cause of action for discrimination based upon a mental disorder.¹⁰⁹ The plaintiff, a female-to-male transgender, was terminated by his employer.¹¹⁰ The court said the plaintiff had established a *prima facie* case for his claim alleging discrimination based on a mental disorder in violation of Connecticut General Statute § 46a-60(a)(1).¹¹¹ Because the statute did not provide a definition of a mental disorder, the court relied on the Connecticut Patient’s Rights statute, or General Statutes § 17a-540, which explains a mental illness exists when a person suffers “from one or more mental disorders as defined in the most recent edition of the American Psychiatric Association’s ‘Diagnostic and Statistical Manual of

108. No. CV95 0553003, 1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997) (unpublished decision).

109. *Id.* at *5 (finding a cause of action for discrimination against a transgender individual may be predicated on the fact that being transgender is a recognized mental disorder). The Americans with Disabilities Act of 1990 specifically excludes “gender identity disorders” from the protections of the Bill. Americans with Disabilities Act of 1990, Pub. L. No. 101-33, § 511(b)(1), 104 Stat. 327, 376 (codified as amending 42 U.S.C. § 12211 (2006)). Courts continually find GID is not protected as a physical disability under the ADA or similar state acts *but* have provided protection to individuals against employment discrimination and Eight Amendment violations by categorizing GID as a mental disorder. *Compare*, *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 471 (Iowa. 1983) (failing to consider a transgender person as either as physically or mentally handicapped under Iowa law), *and* *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (declining to find a transgender person meets the qualifications of a disabled person under Pennsylvania law), *with* *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (concluding “transsexualism” is a complex psychological and medical disorder requiring accommodations), *and* *Meriwether v. Faulkner*, 821 F.2d 408, 411–12 (7th Cir. 1987) (stating that a inmate had a valid Eight Amendment claim for the prisons’ failure to provide medical treatment for her based on her status as a transgender woman).

110. *Conway v. City of Hartford*, No. CV95 0553003, 1997 WL 78585, at *1 (Conn. Super. Ct. Feb. 4, 1997) (unpublished decision).

111. *Id.* at *5 (finding a cause of action for discrimination of a transgender individual may be predicated on the fact that transsexualism is a recognized mental disorder). GID has been identified by courts as a as a serious medical disorder requiring the same treatment as any other psychiatric diagnosis. *E.g.*, *Long v. Nix*, 877 F. Supp. 1358, 1364-65 (S.D. Iowa 1995) (stating that a prisoner’s protection under the Eighth Amendment turns on whether he has a diagnosis of transsexuality or gender dysphoria); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (stating that transsexualism is a psychiatric disorder and should be treated by the courts as a serious medical need); *Meriwether v. Faulkner*, 821 F.2d 408, 411–14 (7th Cir. 1987) (requiring transsexualism be treated the same as any other psychiatric disorder).

Mental Disorders.’”¹¹² The court explained it would not strike the mental disorder claim for three reasons. First, “the definition of ‘mental disorder’ in General Statutes § 17a-540 [] includes those diagnoses found in the” Diagnostic and Statistical Manual of Mental Disorders (DSM).¹¹³ Second, in *Farmer v. Brennan*,¹¹⁴ the Supreme Court noted the American Psychiatric Association’s (APA) definition of a “transsexual person”—“one with [a] ‘rare psychiatric disorder,’”—and seemed to require federal prisons to consider a transgender inmate’s physically altered gender, for safety reasons, when determining whether to move him to the often more dangerous general population.¹¹⁵ Finally, the opposing party conceded that in the present case GID is a listed diagnosis in the DSM.¹¹⁶ Although there was no final judgment as to the plaintiff’s claim, the court acknowledged that GID was a protected mental disorder under Connecticut law.¹¹⁷

Like the handicap theory of disability, under the mental disability framework, transgender students will only receive protection if their state has a broad definition of a mental disorder like Connecticut.¹¹⁸ The circumstances of the court’s decision in *Conway* are not commonplace. The court seemed to piece together a broad definition of “mental disorder” and the opposing party agreed that GID was a mental disorder.¹¹⁹ Still, the court did begin to lay the groundwork for GID being considered a recognized disability under the law, outside of Connecticut, by pointing

112. *Conway*, 1997 WL 78585, at *4 (unpublished decision).

113. *Id.* at *5. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is published by the American Psychiatric Association and was developed to standardize the categorization of mental disorders for practitioners in clinical, research and statistical settings. *History*, AM. PSYCHIATRIC ASS’N, http://www.psych.org/MainMenu/Research/DSMIV/History_1.aspx (last visited Jan. 9, 2011). By referring the courts to the DSM, the Connecticut statute provides greater guidance than the comparable federal statute that conveys the label of mental illness with only the diagnosis by a mental health professional. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 10802(4) (2006).

114. 511 U.S. 825 (1994) (outlining standards to hold prison officials accountable for treatment of prisoners under a duty to protect them from harm).

115. *Id.* at 828 (describing the diagnosis of an inmate by the Bureau of Prisons medical staff as a transgender). In *Farmer*, the Bureau of Prisons used current diagnostic guidelines as laid out by both the AMA and the APA for describing the “transsexual” condition. *Id.* Although the Court once embraced definitions of the DSM it has become increasingly skeptical of using the DSM in court proceedings. *Compare id.* at 829 (approving of the DSM definition of transgender to characterize a preoperative transgender inmate), *with* *Clark v. Arizona*, 548 U.S. 735, 775–76 (2000) (disapproving of the use of DSM definition in criminal cases due to the ever changing diagnostic criteria of psychiatrics and internal dissention amongst practitioners).

116. *Conway*, 1997 WL 78585, at *5 (unpublished opinion).

117. *Id.*

118. *See id.* at *4–5.

119. *Id.*

to a Supreme Court decision that recognized being transgender as a mental disorder because it was listed in the DSM.¹²⁰

These theories may be innovative ways for transgender students to be protected from discrimination and disparate treatment in their schools. However, the classification of someone who is transgender as disabled is controversial. There are several arguments made for and against protecting transgender people under a disability framework.

3. Advantages and Disadvantages of the Disability Framework

The disability framework is the subject of much debate in the transgender community.¹²¹ The debate centers on the need for effective arguments to protect transgender people from discrimination versus the need to correct misperceptions of transgender people to the mainstream public. There are three arguments in favor of using the disability framework.

a. Advantages

In her article *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, Jennifer Levi outlines the advantages of transgender people filing claims under traditional disability law.¹²² The arguments she puts forward concern the effectiveness of a disability claim in protecting a transgender person from discrimination.¹²³ First, she argues that disability law humanizes the plaintiff to a judge that may see the plaintiff as deviant.¹²⁴ The disability framework positions a transgender youth, simply, as a child with a disability.¹²⁵ Aligning transgender youth with this

120. *Id.* at *5.

121. See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 74 (Paisley Currah et al. eds., 2006) (exploring the controversy surrounding the use of disability laws to protect transgender people).

122. Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 *COLUM. J. GENDER & L.* 90, 104 (2006) (reiterating how incorporating a disability claim humanizes a transgender litigant and potentially affects the outcome of the case); see, e.g., *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Feb. 26, 2001) (holding a transgender student stated a viable disability discrimination claim under state law); see also *Smith v. City of Jacksonville Corr. Inst.*, Order No. 88-5451, 1991 WL 833882 *15 (Fla. Div. Admin. Hearings. Oct. 02, 1991) (holding an individual with gender dysphoria is protected from discrimination based on disability or perceived disability under state statute); *Jane Doe v. Electro-Craft Corp.*, No. 87-B-132, 1988 WL 1091932, at *7 (N.H. Sup. Ct. 1988) (holding GID is a disability under the state employment discrimination statute).

123. Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 *COLUM. J. GENDER & L.* 90, 104 (2006).

124. *Id.*

125. *Id.*; see *Yunits*, 2000 WL 33162199, at *3.

group may make it easier for judges to understand and empathize with transgender children.

Second, Levi argues that “[a] disability claim gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language a judge can understand.”¹²⁶ Some critical theorists argue that the rights of oppressed groups will not be advanced until their interests converge with the interests of the dominant group.¹²⁷ By framing a transgender youth’s claim in terms of a disability, this may allow the judge to align society’s interest in protecting disabled children with the interest of safeguarding the rights of the transgender litigant.

For example, in *Doe v. Bell*,¹²⁸ Jean Doe, a male-to-female full-time transgender youth, was diagnosed with GID.¹²⁹ Doe, a foster child, filed suit against the New York City’s Administration for Children’s Services (ACS) for violating the New York Human Rights Law (NYHRL) by prohibiting her from wearing skirts and dresses.¹³⁰ Specifically, Doe claimed that (1) ACS’s dress code violated the NYHRL because it dis-

126. Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 104 (2006) (claiming a disability is understood by judges to affect the way disabled individuals might react differently than a non-disabled persons in particular situations; therefore, a disability distinction would allow for more positive outcomes for plaintiffs). Levi contends that “until courts understand the inelasticity of gender for most individuals alongside its social construction, sex discrimination claims [especially regarding dress codes] will have limited utility.” *Id.* at 91. Moreover, humanizing a transgender person under a disability claim would require an understanding that gender conformity is not necessarily a voluntary act of personal preference. See Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-based Discrimination: Cautionary Tales From Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 195 (2009). However, some transgender persons are reluctant to bring a disability claim for fear of facing greater stigmatization. See Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 105 (2006).

127. See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001) (discussing the many aspects of Critical Race Theory). One proponent of the principle of interest convergence is Professor Derrick Bell, who offers a critique of Professor Herbert Weschler’s assessment of *Brown v. Board of Education*, and then adds his own theory of how Black interests in education would best be served. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980). Bell asserts that the principle of interest convergence provides: “The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” *Id.* at 523. Within the context of education, Bell suggests that because convergence of interests between the two groups may not be possible to “obtain[] real educational effectiveness,” there needs to be “improvement of presently desegregated schools as well as the creation or preservation of model black schools.” *Id.* at 532.

128. 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

129. *Id.* at 847.

130. *Id.* at 847–48.

criminated “against her based on disability,” and (2) ACS “failed to make reasonable accommodations” for her disability.¹³¹ The court first determined that because GID was a protected disability under NYHRL and Doe was clinically diagnosed with GID, “[n]o more [was] required for Doe to be protected from discrimination under” NYHRL.¹³² The court next turned to Doe’s primary challenges and held that ACS’s dress code was “neutral on its face and applie[d] to all persons at the facility who wish[ed] to wear feminine clothing, whether or not they suffer[ed] from GID.”¹³³ However, the court held that ACS had a responsibility under the NYHRL to provide “reasonable accommodations” for Doe because she was diagnosed with GID.¹³⁴ The court concluded that exempting Doe from the dress code was a reasonable accommodation.¹³⁵

The New York court’s analysis in *Bell* is an example of how a disability claim can be used to protect the rights of transgender youth under a well-established legal paradigm. In that case, Doe not only was clinically diagnosed GID, but also was protected as an individual with GID under the New York statute. Thus, it was not difficult for Doe to fit into the established disability framework. However, as previously explained and further discussed in the following section, it may be near impossible (and possibly undesirable) for a transgender youth to be clinically diagnosed with GID or establish that he or she has a disability.

b. Disadvantages

The arguments against using a disability framework stem principally from the need to correct misconceptions about transgender individuals.¹³⁶ First, the stigma of being considered disabled may cause more harm than good for transgender youth.¹³⁷ To begin, transgender youth and gay students have a higher rate of suicide than their gender conforming and heterosexual classmates because they feel misunderstood and alone.¹³⁸ Studies show students who are categorized as disabled often feel alienated or do not feel that they are a part of the school com-

131. *Id.* at 851.

132. *Id.*

133. *Bell*, 754 N.Y.S.2d at 851.

134. *Id.* at 852–53.

135. *Id.* at 853.

136. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 74 (Paisley Currah et al. eds., 2006).

137. *Id.*

138. See Monica R. Brown et al., *Secondary Students’ Perceptions of School Life with Regard to Alienation: The Effects of Disability, Gender and Race*, 26 *LEARNING DISABILITY Q.* 227, 236 (2003) (discussing the need for research studies of transgender youth). The author argues more research is needed to accurately engage transgender students, both

munity.¹³⁹ Thus, for transgender students, being labeled disabled, as though being transgender is to be “sick, abnormal, or inferior,” common stereotypes associated with being disabled, may make them feel even more marginalized than they already are.¹⁴⁰

Second, many transgender people, particularly youth, may not fit into the disability framework because they have yet to be diagnosed with GID.¹⁴¹ In his article, *Resisting Medicine, Re/modeling Gender*, Dean Spade explains that, when he represents a transgender person and makes a disability argument, he has to frame the argument in terms of his client having a “diagnosable condition.”¹⁴² Spade notes that this claim will typi-

socially and academically. *Id.* Insight into the trials and tribulations of these youth could aid in reducing their suicide rates. *Id.*

139. *Id.* at 230 (examining the results of alienation studies of students in inclusive elementary classrooms). The study showed disabled students in the second through fourth grades more frequently felt socially isolated from other students and were more likely to leave school than those who feel like a part of the school. *Id.*

140. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 74 (Paisley Currah et al. eds., 2006) (explaining the misunderstanding of the term “disability,” when used to extend civil rights legal protection to transgender people).

141. See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 *BERKELEY WOMEN'S L.J.* 15, 16–18 (2003) (asserting that medical evidence will be “the cornerstone” of any legal claim brought by a transgender person). Spade addresses the gender identity criteria employed in GID diagnoses, which can be problematic for young people and those wishing to defy rigid gender distinctions. See *id.* at 23–24. Those seeking gender reassignment surgery must first prove that they suffer from GID. *Id.* at 24. Symptoms of GID outlined in the Diagnostic and Statistical Manual (DSM–IV), extensively describe stereotypical childhood gender identity behavior and label certain behaviors as gender inappropriate. *Id.* Boys with GID engage in traditionally “feminine” behavior and activities such as “playing house, drawing pictures of beautiful girls and princesses, and . . . avoid rough-and-tumble play and competitive sports.” *Id.* (quoting the American Psychological Association, *Diagnostic and Statistical Manual: DSM-IV* 533 (4th ed. 1994)). Girls with GID display a preference for traditionally “masculine” activities such as contact sports and prefer wearing boys’ clothing. *Id.* The problem with this diagnostic framework is that it paints a crude picture of “natural” gender behavior that is simply unrealistic. *Id.* at 25. In addition to the gender-troubled childhood requirement, a GID diagnosis largely depends on the transgender person’s ability to “successfully” inhabit their new gender. *Id.* at 26. Because this “success” is determined by non-transgender people, it forces transgender individuals to express their gender in a narrow and formulaic manner. *Id.* Of his own experience as a female-to-male transgender person, Spade explains, “[m]y quest for body alteration had to be legitimized by a medical reference to, and a pretended belief in, a binary gender system that I had been working to dismantle since adolescence.” *Id.* at 24.

142. *Id.* at 34–35 (outlining the requirements transgender clients have to meet under disability discrimination statutes). Bringing transgender claims under disability discrimination statutes is currently the most controversial issue in transgender law. *Id.* at 32. Disability claims require a showing of a physical or mental impairment that is diagnosable through accepted and widely used medical and laboratory techniques. *Id.* at 33. Many low-income people do not have access to those medical facilities and therefore would never even get

cally not work for low-income people because they may not be able to afford to see a mental health expert to diagnose them with GID.¹⁴³ Similarly, most transgender youth end up homeless, without an education, and jobless because of discrimination.¹⁴⁴ Many of them cannot afford gender conversion treatments and surgery. Moreover, transgender youth cannot receive hormones and therapy without the consent of a parent. If their parents do not support their transformation—which is likely—then they will not be able to access the treatment, making it even more unlikely that transgender youth will be able to access the necessary medical diagnosis and treatment to complete their transformation and build a successful disability claim.¹⁴⁵

Also, using a disability framework requires the litigants to demonstrate that they suffer from a health condition that limits a major life activity, which may not apply to all transgender people.¹⁴⁶ Some transgender people do not think their GID, or being transgender, is limiting. For example, Youngblood, a part-time transgender youth, would not fit into the disability framework.¹⁴⁷ Her transgender behavior did not require the

diagnosed as disabled. *Id.* at 35. Without a GID diagnosis, an individual is barred from pursuing claims under disability discrimination statutes. *Id.* at 34–35. However, even though the American with Disabilities Act and the Rehabilitation Act explicitly exclude coverage for transgender individuals, successful claims on behalf of transgender plaintiffs have been brought in state courts under disability discrimination statutes. *Id.* at 33. Relying on the protection of disability laws also binds transgender people to the language of medicine in order to state a claim. *Id.* at 175. Unfortunately, many transgender people do not have access to expensive medical care that is necessary to diagnose conditions such as GID. *Id.*

143. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in *TRANSGENDER RIGHTS* 217 (Paisley Currah et al. eds., 2006).

144. *Id.* at 219 (detailing the difficulties that transgender persons encounter both socially and legally).

145. See Sonja Shield, *The Doctor Won't See You Now: Rights of Transgendered Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 362–63 (2007) (illustrating the lack of options available to transgender minors even if they are capable of consenting to the sex reassignment treatment). Generally speaking, “minors below the age of consent may not authorize their own medical care.” *Id.* at 363. The law is structured so parents ultimately determine the appropriate medical care for their children. *Id.*

146. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ. 02-1531PHX_SRB, 2004 WL 2008954, at *4, *5 (D. Ariz. June 3, 2004) (finding a transgender plaintiff failed to show an impairment of a major life activity stemming from GID). The court’s finding, however, did not preclude all individuals with GID from establishing a major life activity impairment from GID. *Id.* at 5.

147. *Id.* at *4–5; Phyllis Randolph Frye, Essay, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 155 (2000).

use of hormones or any other type of medical treatment.¹⁴⁸ As a result, the judge in her case “saw her rejection of girls’ clothing as mere whimsy”¹⁴⁹ rather than an “expression of her ‘core identity.’”¹⁵⁰ A court is likely to make the same analysis when another “part-time” transgender youth attempts to use the disability framework.

Finally, transgender rights advocates disagree with employing the disability framework in discrimination cases because the whole concept of gender is socially constructed in the sense that society has created categories of what is considered male and female.¹⁵¹ Instead of troubling socially constructed notions of gender, “the diagnostic and treatment processes for GID are regulatory and promote a regime of coercive binary gender.”¹⁵²

For example, a male-to-female transgender person may desire to undergo breast augmentation surgery. Social constructionists would argue that society, through mediated images, has manipulated people into believing that having breasts is equivalent to being a woman.¹⁵³ However, not every woman has breasts and not every woman has breasts that are larger than a man. Social constructionists argue that a transgender individual should be able to become a woman without having breast augmen-

148. See Part I of this Article discussing characteristics of part-time transgender people.

149. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS-GENDER RIGHTS* 3, 12 (Paisley Currah et al. eds., 2006) (discussing conflicting judicial decisions). The judge felt that Youngblood’s “desire to wear masculine clothing was not tied to her status as a female.” *Id.*

150. *Id.* at 11 (contrasting the message conveyed by Doe’s expression with that of Youngblood’s). The judge seemed puzzled by whether Youngblood would have been satisfied with a less stereotypically feminine outfit for her senior portrait, or whether Youngblood would have refused to wear any garment that could be construed as “traditionally feminine.” *Id.*

151. Julie A. Greenburg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANS-GENDER RIGHTS* 51, 52 (Paisley Currah et al. eds., 2006) (reviewing how gender has been legally defined, and the view of gender as a social construct).

152. See Noa Ben-Asher, Note, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 *HARV. J. L. & GENDER* 51, 58 (2006) (classifying transgender persons through a binary creates disagreeable outcomes). A binary categorization approach consists of two opposing concepts. See Diane S. Meier, Note, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 *WASH. & LEE J. CIVIL RTS. & SOC. JUST.* 147, 150 (2008). “Truth/falsity, right/wrong, and just/unjust are examples of binaries that seem to stem from a human tendency to bifurcate concepts into positive and negative terms.” *Id.* Binary categorization classifies persons who do not fit into the binary categorization as aberrant social outcasts. *Id.*

153. See Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 *CALIF. L. REV.* 561, 563–64 (2007) (arguing physical appearance should no longer define gender).

tation surgery because the notion that they need breasts to be a woman is socially constructed.¹⁵⁴

In sum, using the disability framework has advantages and drawbacks. If it were merely a matter of efficacy, then the disability claim would be an easy solution for protecting transgender students' rights. The disability framework is already well-established in the law, and bringing this claim would only require articulating the facts of a client's case to conform to this framework. However, as is emphasized in Part IV, when deciding what claims should be litigated, in a case involving a transgender youth, an advocate should take into consideration the needs of her client, and many transgender people do not want to be labeled "disabled," "physically handicapped," or "mentally ill."

I now turn to a claim that provides a different avenue for protecting transgender students' rights—constitutional law.

B. *First Amendment Freedom of Expression*

Freedom of expression claims in the context of transgender students' rights are easier to maneuver than the disability framework because, as the court pointed out in *Yunits*, it is well-established that students have a right to freedom of expression.¹⁵⁵ To this end, the Supreme Court has explained that a school may not suppress the speech of a student unless it "materially and substantially interfer[es] with" the work of the school.¹⁵⁶ However, before transgender students can challenge a dress code on freedom of expression grounds, their claim must establish that: (1) their expression of gender identity is "protected speech" and (2) the defendant's

154. *Id.* (discussing the cultural process of creating stereotypes of sex-appropriate behavior and gender identity). Gender roles and norms are socially constructed concepts, and under the social constructionist theory, "bodies end up meaning less . . . than the roles, clothing, myths, and stereotypes that transform a vagina into a she." *Id.* at 564. Because of this binary categorization of right/wrong and the social expectations of gender, heterosexuality is considered to be the social norm and homosexuality is automatically considered deviant. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 718 (2010) (analyzing the application of employment discrimination law to LGBT and intersex individuals).

155. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000) (citing *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 5106 (1969)).

156. See *Tinker*, 393 U.S. at 513 (asserting that a school's prohibition on students wearing black armbands to protest the Vietnam war offends the Constitution). In discussing the gravity of the conduct at issue, the Court likened the students' silent protest to "pure speech." *Id.* at 508. That conclusion was based on the innocuous nature of the students' protest, which did not interfere with the learning environment. *Id.* In addition, the small number of students protesting relative to the large student population supported the conclusion that the protests did not disrupt the learning environment. *Id.*

conduct intended to suppress it.¹⁵⁷ To outline the use of freedom of expression to protect a student's gender expression, I explore *Yunits* further.

1. Protected Speech

In *Yunits*, the court outlined Supreme Court cases defining protected speech.¹⁵⁸ Primarily, the Court explained protected speech must be "sufficiently imbued with the elements of communication to fall within the scope of the First [Amendment]" or the speech must communicate the individual's intended message.¹⁵⁹ This is determined by the context of the situation.¹⁶⁰ Thus, for a transgender litigant, whether their behavior is protected will hinge on whether the court thinks their message of gender nonconformity has been communicated.¹⁶¹ In *Yunits*, the court explained Doe's desire to be considered a female was communicated to students and administration as evidenced by their reaction to her—Doe was harassed, physically abused, and/or punished by peers, teachers, and administrators because of her gender nonconformity and, ultimately, removed from the school.¹⁶²

157. *Yunits*, 2000 WL 33162199, at *3; see also *Texas v. Johnson*, 491 U.S. 397, 401 (1989).

158. *Id.* (establishing first whether the conduct in question amounted to expressive speech that would then be protected if suppressed before discussing the school's suppression of that conduct).

159. *Spence v. Washington*, 418 U.S. 405, 409–10 (1974) (holding a display of an upside down United States flag with an attached peace symbol clearly communicated college student's message and qualified as protected speech). The Court expressed that "there can be little doubt that the appellant communicated through the use of symbols" and "[t]he undisputed facts are that appellant 'wanted people to know that I thought America stood for peace.'" *Id.*

160. *Id.* ("[T]he nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.") (emphasis added). In the context of then current domestic and international affairs it would have been difficult for many citizens to miss the point of the display. *Id.* at 410. The context in which a symbol is displayed is important for purposes of expression because context may provide the meaning to the symbol. *Id.* (citing *Tinker*, 393 U.S. at 505–14).

161. *Yunits*, 2000 WL 33162199, at *4 (citing *Bivens v. Alburquerque Pub. Sch.*, 899 F. Supp. 556, 560 (D.N.M. Aug. 25, 1995)).

162. *Id.* (observing "[t]he school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received."). The *Yunits* court commented that junior high school students, although technically still in primary school, are not too young to comprehend that their classmate is a biological male who identifies with the female gender and is more comfortable dressing in traditionally female garb. *Id.* at *4–5. Interestingly, in the same opinion recognizing harassment of Doe by students and school administration due to her dress and behavior, the *Yunits* court asserted that Doe would likely succeed in proving that her attire was *not* distracting to her

2. Suppression of Speech

After a transgender litigant establishes that there is protected speech, he must explain whether the speech can or cannot be suppressed. The standard as to whether speech in a school setting may be suppressed was articulated by the Supreme Court in *Tinker*.¹⁶³ In *Tinker*, the Court explained suppression of a student's speech is permissible only if the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."¹⁶⁴ Furthermore, a student's conduct may be suppressed if it is considered threatening, harassing, or obscene.¹⁶⁵ In *Yunits*, the court explained that Doe's attire did not interfere with the work of the school because her attire was the traditional female attire often worn by girls at the school.¹⁶⁶ Because it did not interfere when biological females wore the attire, it did not interfere when Doe, a biological male with GID, wore the attire.¹⁶⁷

At first blush, a freedom of expression claim seems like a straightforward way to challenge a school's dress code. However, this claim will not always strengthen a transgender student's suit. I now discuss the advantages and disadvantages of a First Amendment freedom of expression claim.

3. Advantages and Disadvantages of Freedom of Expression Claims

Compared to the disability claim, there are fewer critiques of using a First Amendment claim in the context of transgender students' rights.

fellow students. *Id.* at *6. The court distinguished between distractions in the form of disruptive reactions to Doe's apparel that were based in discrimination and distractions that would substantially hinder the learning process in an academic environment. *Id.* at *5.

163. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 513 (1969) (protecting the right of students to express themselves as long as their expression does not disrupt the learning environment). The Court rejected the district court's conclusion that the school authorities' actions based on fear of a disturbance was reasonable. *Id.* at 508. The opinion asserts that the right to freedom of expression cannot be trumped by "undifferentiated fear or apprehension of disturbance." *Id.* In fact, the strength of our nation is dependent on our openness and freedom to express our beliefs. *See id.* at 508–09.

164. *Id.* at 513 (noting that student conduct in or out of the classroom that interferes with the learning environment, other students, or "involves substantial disorder" is not protected).

165. *See Bethel Sch. Dist. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (characterizing behavior which a school may prohibit in order to maintain an orderly educational atmosphere). The Court emphasized, "the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others." *Id.* at 683. While the Constitution guarantees the free speech of the people, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.* at 682.

166. *Yunits*, 2000 WL 33162199, at *4.

167. *Id.*

This is likely because freedom of expression has long been used as framework to analyze gender nonconforming behavior for students that do not identify as transgender.¹⁶⁸

a. Advantages

The most obvious advantage of utilizing a freedom of expression claim is that the standard set by *Tinker* is well known and has been used in various freedom of expression cases with little to no change.¹⁶⁹ Through *Tinker*, members of the Court articulated that all students have rights to freedom of expression.¹⁷⁰ Justice Fortas, writing for the Court, said:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate. This has been the unmistakable holding of this Court for almost 50 years.¹⁷¹

While freedom of expression is not absolute, the Court's stance gives credence to a transgender litigant's use of the claim, as long as the advocate can shape the claim in a way that will fit within *Tinker*'s framework.

Second, First Amendment claims help invoke the rhetoric of the Civil Rights Movement.¹⁷² The Civil Rights Movement centered on the notion that people of color, and individuals in general, should not be denied their rights and treated differently because of their identity.¹⁷³ Other movements began to appropriate this rhetoric to fight for women's rights

168. See, e.g., *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820, 822 (N.D. Ill. 1987) (referring to a school's anti-gang policy of prohibiting males from wearing earrings, passed for safety reasons, was upheld because plaintiff's desire to wear an earring as an expression of his individuality and attractiveness to girls was a message not within the scope of the First Amendment); see *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (finding evidence of disruption inadequate to support school's hair length regulation for males). Although courts typically do not interfere in the operation of public schools, they will uphold constitutional values threatened "for the sake of some nebulous concept of school discipline." *Id.* at 1037.

169. *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560 (D.N.M. Aug. 25, 1995); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000).

170. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969).

171. *Id.* (illustrating the far-reaching implications of the right to freedom of expression).

172. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS-GENDER RIGHTS 14* (Paisley Currah et al. eds., 2006) ("compar[ing] the oppression of [LGBT] people to that of people of color and the movement for [LGBT equality] to that of the civil rights movement.").

173. *Id.*

and gay rights, for example.¹⁷⁴ Making rights-based identity claims, as opposed to challenging particular practices, is one of the legacies of the Civil Rights Movement.¹⁷⁵ Thus, a freedom of expression claim is more likely to be successful than other claims, such as disability, because it is rooted in language and a legal framework with which the courts are familiar.¹⁷⁶

b. Disadvantages

First, the standard for determining whether a violation of a student's freedom of expression has occurred is very subjective.¹⁷⁷ The court has to draw artificial lines, regarding whether a transgender youth's message was communicated and whether that message was received.¹⁷⁸ For example, in *Yunits* the court drew a line between a case in which a student wore baggy pants to express his Black identity and another case where a student wore a rosary to express her Catholic identity.¹⁷⁹ The court reasoned it had not been clearly communicated that baggy pants was how the student expressed his racial identity.¹⁸⁰ However, because a rosary was clearly understood to be a religious symbol, the student's message was communicated.¹⁸¹ Thus, when faced with the type of factual situation that has not been previously litigated, i.e., a transgender student's expres-

174. *Id.*

175. *Id.*

176. *Id.*

177. *Texas v. Johnson*, 491 U.S. 397, 403 (1989); *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 560 (D.N.M. Aug. 25, 1995).

178. *Bivens*, 899 F. Supp. at 560; *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000).

179. *Yunits*, 2000 WL 33162199, at *4 (examining the speech aspects of symbolic acts when such acts are intended to convey a specific message to a comprehending audience). Compare *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (asserting rosary beads worn by students to profess their faith were likely to be recognized as speech related to religion and therefore protected), with *Bivens*, 899 F. Supp. 556 (student failed to provide evidence that his wearing of sagging pants to express "his identity as a black youth" was understood by others and, therefore, such attire was not speech). In this case, Plaintiff asserted that sagging was popular among minorities, particularly in the style of "hip-hop." *Bivens*, 899 F. Supp. at 561. However, Judge Campos did not associate sagging with one particular racial group. *Id.* In the opinion, Judge Campos stated, "sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States." *Id.*

180. *Bivens*, 899 F. Supp. 556.

181. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665 (S.D. Tex. Sept. 3, 1997) (holding that a rosary was identifiable to a layperson as a symbol of Christianity, if not Catholicism specifically). In *Chalifoux*, a local gang had been known to wear rosaries as symbols of gang affiliation. *Id.* at 664. The *Chalifoux* court deemed the practice of wearing a rosary an easily identifiable and protected method of professing one's faith. *Id.* at 665. The infrequent occurrences of rosaries acting as symbols of gang affiliation were

sion of gender identity, it may be difficult to determine how the court will rule, as the freedom of expression standard is fact specific, and thus, a determination under this standard varies depending on the case.

Another disadvantage of bringing a freedom of expression claim is that this claim relies heavily on diagnosed or even expressed GID. Specifically, the courts' analysis in *Yunits* and *Youngblood* indicate that litigants must prove that what they are expressing is a core part of their identity. As previously explained, for transgender youth, like Nikki Youngblood and other part-timers, freedom of expression is not a strong claim. Youngblood did not argue that dressing "like a boy" was essential to her core identity.¹⁸² She argued that she had always dressed in masculine attire since she was a girl.¹⁸³ To the court, this was not enough to establish a First Amendment claim.¹⁸⁴ Conversely, the plaintiff in *Yunits* tied her gender expression to her identity and her GID.¹⁸⁵ Because she was able to connect her GID to her gender expression, Doe's claim successfully invoked the Civil Rights rhetoric,¹⁸⁶ which led the judge to cite cases like *Brown v. Board of Education* and compare Doe's treatment to a "separate but equal" standard.¹⁸⁷

Finally, when analyzing whether a transgender youth's expression is protected speech, the court in *Yunits* relied heavily on whether the student was harassed.¹⁸⁸ This is a problem because the court in *Yunits* is the only court, thus far, to conduct the freedom of expression analysis in the context of a transgender student's rights. Thus, if other courts adopt this framework of analysis, the threshold amount of harassment and bullying needed to prove a freedom of expression claim is unclear. Furthermore, the *Yunits* court's analysis begs the question: How much harassment is necessary for a transgender student's speech to be protected? In *Yunits*,

not enough to supplant a firm association between a crucifix and profession of religious faith. *Id.*

182. See Complaint for Plaintiff, Youngblood *ex rel.* Youngblood v. Sch. Bd. of Hillsborough Cnty., Fla., (2002) (No. 8:02-CV-1089-T-24MAP), 2002 WL 32664478.

183. *Id.* at ¶8.

184. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS- GENDER RIGHTS* 3, 11 (Paisley Currah et al. eds., 2006).

185. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3-4 (Mass. Super. Ct. Oct. 11, 2000); Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS- GENDER RIGHTS* 3, 8-9 (Paisley Currah et al. eds., 2006).

186. See Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANS- GENDER RIGHTS* 3, 14 (Paisley Currah et al. eds., 2006).

187. See *Yunits*, 2000 WL 33162199, at *7 (dispelling defendant school's argument that home schooling provided an educational experience equivalent to that of the classroom environment and reiterating the famous holding that "in the field of public education the doctrine of 'separate but equal' has no place") (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

188. *Id.* at *4.

Doe was threatened by classmates and suspended from school by the administration on several occasions.¹⁸⁹ Thus, it seems that, for students to be successful on a freedom of expression claim, they must show that they were harassed by multiple parties including, peers, teachers, and administrators.¹⁹⁰ This analysis is problematic because it focuses less on the harm that even one incident of harassment could have on a child and more on what the court subjectively deems “enough” abuse.¹⁹¹

Both the disability and freedom of expression claims are an acceptable starting point for protecting transgender students’ rights. However, it is important to remember that transgender youth are vulnerable not only because they are members of the transgender community, but also because they are *children*. Thus, as advocates proceed with litigation, they should not only consider the advantages and disadvantages of particular claims, but also their client’s non-litigation needs. In the following section, I explore challenges that transgender youth face outside the context of litigation and strategies that advocates and educators can use to help transgender youth negotiate these challenges.

Imagine waking up every day and having to be so safeguarded about the lisp in your voice or the way you hold your body, your mannerisms—every moment of your life in public—then suddenly coming into a building where that’s not as much of an issue. All those layers have to get unpeeled, all those defense mechanisms, all those levels, have to be worked out.

– Thomas Krever, Associate Executive Director of Programs
at Harvey Milk High School¹⁹²

V. BEYOND LITIGATION

A “safe space” is created when individuals believe that they are not being judged, their opinions are respected, they are physically safe, and they can trust the people around them. For some, a safe space is a form of resistance and a place where individuals can recreate and solidify their definition of self, which can often be challenged by various life experiences.¹⁹³ With this goal in mind, in 2003, the Harvey Milk High School

189. *Id.* at *1, *4.

190. *Id.* at *4.

191. *See id.* at *3–4.

192. John Colapinto, *The Harvey Milk School Has No Right to Exist*, *Discuss.*, *NEW YORK MAG.*, May 21, 2006, <http://nymag.com/nymetro/news/features/10970>.

193. *See* Mary V. Alfred, *Success in the Ivory Tower: Lessons from Black Tenured Female Faculty at a Major Research University*, in *SISTERS OF THE ACADEMY: EMERGENT BLACK WOMEN SCHOLARS IN HIGHER EDUCATION* 57, 61 (Reitumetse Obakeng Mabokela & Anna L. Green eds., 2001).

(HMHS) opened its doors to one hundred LGBT youth.¹⁹⁴ The school operates on the belief that “all young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential.”¹⁹⁵ The school did not open without controversy.¹⁹⁶ Many people believed the school was unnecessarily segregating LGBT students similar to the type of segregation that was outlawed by *Brown*.¹⁹⁷ Members of the New York City community, where HMHS is located, have argued that the school only benefits a small group of students, if at all, and is no different than other city schools.¹⁹⁸ When the school opened, State Conservative Party Chairman Mike Long vehemently criticized the school.¹⁹⁹ He disapprovingly remarked, “Is there a different way to teach homosexuals? Is there gay math? This is

194. See *First Public Gay High School to Open in NYC*, USA TODAY, July 28, 2003, http://www.usatoday.com/news/nation/2003-07-28-gay-high_x.htm. Harvey Milk High School is the first and only public high school in the nation geared towards LGBTQ students. *Id.* Its purpose is to provide a safe educational environment for LGBTQ youth where students can “learn without the threat of physical violence and emotional harm” many of them experienced in traditional learning environments. *The Harvey Milk High School*, HETRICK-MARTIN INST., <http://www.hmi.org/Page.aspx?pid=230> (last visited Sept. 4, 2010). The school is open to all students regardless of sexual orientation and follows the same curriculum and graduation standards as any other fully accredited NYC public high school. *Id.*; see also *Gay Issues Hit Center Stage in '03*, CHI. TRIB., July 31, 2003, 2003 WLNR 15327988. (recognizing Harvey Milk High School's innovative method of youth development). The Harvey Milk High School partners with the Hetrick-Martin Institute, a non-profit agency, to provide students an opportunity to learn with a focus on LGBTQ students. *FAQ's*, HETRICK-MARTIN INST., <http://www.hmi.org/Page.aspx?pid=233>.

195. *Our Mission*, HETRICK-MARTIN INST., <http://www.hmi.org/Page.aspx?pid=310> (last visited Sept. 26, 2010) (quoting language Hetrick-Martin Institute's mission statement). The Institute prides itself on “helping [LGBTQ] youth to reach their full potential.” Hetrick-Martin Institute, *Our History*, <http://www.hmi.org/Page.aspx?pid=229> (last visited Sept. 26, 2010). “HMHS is a transfer school for students in grades 9–12 who have not felt successful in at least one other high school prior to admission and who are committed to taking full ownership of their learning.” *Our Mission*, HARVEY MILK HIGH SCH., <http://schools.nyc.gov/SchoolPortals/02/M586/AboutUs/Overview/Our+Mission.htm> (last visited Sep. 26, 2010).

196. John Colapinto, *The Harvey Milk School Has No Right to Exist. Discuss.*, N.Y. Mag., May 2005, available at <http://nymag.com/nymetro/news/features/10970/>.

197. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (analyzing the devastating impact of segregation on public education). Justice Warren concluded that segregation deprives children of equal educational opportunities and creates a sense of inferiority, which in turn negatively affects a child's motivation to learn. *Id.* at 494–95. Segregation also can inhibit a child's mental development, whereas integration creates the positive effects of healthy learning and development. *Id.* at 494.

198. John Colapinto, *The Harvey Milk School Has No Right to Exist. Discuss.*, N.Y. Mag., May 2005, available at <http://nymag.com/nymetro/news/features/10970/>.

199. Carl Campanile, *School's 'Out'—City is Launching First HS for Gay Teens*, N.Y. Post, July 28, 2003, available at 2003 WLNR 15006253 (complaining the school was a construct of “social engineering” and a waste of tax dollars).

wrong There's no reason these children should be treated separately."²⁰⁰

The school does not purport to provide a "special" type of education.²⁰¹ Nor is the school only for gay students.²⁰² Proponents of the school explain that it simply removes LGBT children "from a dangerous situation in order to give them a chance to learn safely."²⁰³ Many of these students were bullied at their previous schools to the point that they could not complete their lessons and many of them were forced to drop out.²⁰⁴ Furthermore, the school provides "a successful refuge for a small portion of youth, who have fled unsafe schools in order to secure their right to a safe educational environment."²⁰⁵

HMHS cost New York \$3.2 million.²⁰⁶ Not every state or city has an education budget that can accommodate or a school administration that would support the creation of a high school like HMHS. Yet, transgender students, no matter where they are, deserve the same kind of safe space created by HMHS. Accordingly, the following section discusses ways that advocates can create a safe space for their clients during the litiga-

200. *Id.* (reporting on New Your City's first high school for LGBT students). Long's statement exemplifies the concerns and reservations people may have towards supporting "special schools." *Id.* He believes better enforcement of the city and state's existing discrimination laws would solve the problem of "gay-bashing." *Id.*

201. John Colapinto, *The Harvey Milk School Has No Right to Exist*, *Discuss.*, N.Y. Mag., May 2005, available at <http://nymag.com/nymetro/news/features/10970/> (declaring the school's adherence to city-approved curriculum). The school operates like any other school, including following the Department of Education's required curriculum of math, science, English, and other core subjects. *Id.* One aspect distinguishing HMHS from other schools is how issues surrounding the LGBT community are addressed with more candor than they would typically be discussed in another classroom. *Id.*

202. *Id.* (recognizing the school cannot legally base enrollment opportunities on sexual orientation). Although the school does not enroll students based on sexual orientation, it does concede to the natural process of "self-selection." *Id.*

203. Louis P. Nappen, *Why Segregated Schools for Gay Students May Pass a 'Separate but Equal' Analysis but Fail Other Issues and Concerns*, 12 WM. & MARY J. WOMEN & L. 101, 117 n.117 (2005).

204. Paul Henley, *When Most of Your School Is Gay*, BBC NEWS MAG., Nov. 19, 2004, <http://news.bbc.co.uk/1/hi/magazine/4023335.stm> (discussing the environment created for LGBTQ students at Harvey Milk High School in New York City). This progressive high school differs from the average high school not only because almost all of the students are minorities from poor areas of the city, but because the majority of the students are also LGBTQ. *Id.* Because statistics suggest that the "coming out age" for homosexual individuals is becoming increasingly lower and gay teenagers continue to face discrimination in high school, the necessity for this "special" type of segregation may be increasing. *Id.*

205. Louis P. Nappen, *Why Segregated Schools for Gay Students May Pass a 'Separate but Equal' Analysis but Fail Other Issues and Concerns*, 12 WM. & MARY J. WOMEN & L. 101, 117 n.117 (2005).

206. Tracy Dell'Angela, *Gay High School Charts New Territory*, CHI. TRIB., Sept. 8, 2003, available at 2003 WLNR 15415421.

tion process. And because litigation should be the last option for any dispute, this section also addresses ways in which educators and school administrators can create a safe space for transgender students through policies and training, as well as creating a method for reporting and addressing harassment.

A. *Advocates*

Representing transgender youth raises several challenges: first, because they are children, and second, because they are members of a marginalized group.

1. Representing Minors

The role of a child's attorney has been intensely debated for some time.²⁰⁷ The debate steams from the tension between doing what is in the best interest of the child and what the child expressly asks the attorney to do.²⁰⁸ Typically, attorneys turn to the American Bar Association's (ABA) Model Rules of Professional Conduct for guidance as to how they should behave with a client. For many years, the ABA provided little guidance for lawyers trying to represent a child client, except to say that minors should be treated the same as adult clients.²⁰⁹ Specifically, Rule 1.14, concerning the lawyer-client relationship standards for minor clients, explains "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."²¹⁰ In other words, transgender youth should be consulted by their lawyers as to how their claims are pursued and how they are argued. Because the Model Rules do not provide guidance for specific situations, in 1996, the ABA adopted a standard for representing children who have suffered from abuse and neglect (hereinafter the standard).²¹¹ As many transgender youth have been abused and neglected, this standard provides some guidance when representing this group of children.

Besides the typical obligations that an attorney owes a client—an obligation to "obtain copies of all pleadings" and "develop a theory and strategy of the case," the standard advises that attorneys should "[c]ounsel the child concerning the subject matter of the litigation, the child's rights, the

207. Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 872 (2007).

208. *Id.*

209. MODEL RULES OF PROF'L CONDUCT R 1.14 (2010).

210. *Id.* at R 1.14 cmt. n.1.

211. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (2006), available at <http://www.abanet.org/child/repstandwhole.pdf>.

court system, the proceedings, the lawyer's role, and what to expect in the legal process."²¹² This is an important part of representing transgender youth and creating a safe space because they may have specific preferences regarding how their claims are pursued and how they are argued. For example, a transgender youth may not want her attorney to use a disability argument, as previously explained, because she does not believe that she has a mental illness or physical handicap. The simple act of listening to a minor, respecting her opinion, and advocating zealously in support of that opinion will help create a safe space in which a transgender youth is given the opportunity to solidify her identity without being judged or discounted.²¹³

Along the same lines, the standard requires counsel to "identify appropriate . . . professional resources for the child."²¹⁴ This aspect of advocating on behalf of transgender youth is important because transgender youth are disproportionately homeless and many of them do not have access to the hormone treatments they need and/or counseling that they may need.²¹⁵ Fortunately, several programs and youth centers have been created to meet the needs of LGBT youth. Attorneys can turn to these resources to aid them with meeting the needs of their transgender clients.

One of the most notable is the Broadway Youth Center, a program of the Howard Brown Health Center, one of the nation's largest LGBT organizations with a budget of more than \$12.5 million.²¹⁶ Although the Broadway Youth Center is open to all youth, it provides services specifically geared toward the needs of LGBTQA (Lesbian, Gay, Bi-sexual, Transgender, Questioning, and Allied) young people.²¹⁷ For example, the Broadway Youth Center offers resources to assist with emergency housing, employment, mental and physical health, and other basic needs.²¹⁸ Another example is the Houston Area Teen Coalition of

212. *Id.* § B-1.

213. See Mary V. Alfred, *Success in the Ivory Tower: Lessons from Black Tenured Female Faculty at a Major Research University*, in *SISTERS OF THE ACADEMY: EMERGENT BLACK WOMEN SCHOLARS IN HIGHER EDUCATION* 57, 61 (Reitumetse Obakeng Mabokela & Anna L. Green eds., 2001).

214. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B-1 (2006), available at <http://www.abanet.org/child/repstandwhole.pdf>.

215. See Introduction of this Article for an overview of the challenges faced by transgender youth in the United States.

216. *Howard Brown: Mission and Overview*, HOWARD BROWN HEALTH CTR., http://www.howardbrown.org/hb_aboutus.asp?id=153 (last visited November 5, 2010).

217. *Howard Brown: The Broadway Youth Center*, HOWARD BROWN HEALTH CTR., http://www.howardbrown.org/hb_services.asp?id=50&fragment=0&SearchType=AND&terms=lgbtq (last visited November 5, 2010).

218. *Id.*

Homosexuals (HATCH) in Houston, Texas.²¹⁹ HATCH, like the Broadway Youth Center, helps empower LGBTQ youth.²²⁰ However, HATCH operates with the help of twenty four volunteers and hosts weekly meetings for youth “to achieve a climate of societal acceptance and understanding without regard to sexual identity,” as well as provide health education and community outreach opportunities.²²¹ Although the Broadway Youth Center and HATCH operate on different scales, they both provide a safe space for transgender youth, which can aid attorneys in effectively meeting their clients’ needs and providing them with proper, holistic representation.

2. Representing Members of the Transgender Community

In *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, Derrick Bell discusses the consequences of the NAACP’s decision to use integration as a strategy to remedy the gross inequities present in the quality of black children’s education versus their white counterparts.²²² In his article, Bell explains that several tensions manifested as a result of the school desegregation class action litigation, including the tension between the attorney’s interests in furthering the larger goal of resolving inequalities versus the interests of the class and the interests of the individual client and the class.²²³ Deciding which claims to file on behalf of an individual transgender youth is distinguishable from the large-scale strategy involved in the school desegregation cases. However, Bell’s article brings to the forefront the tension that exists when advocating on behalf of transgender youth, namely the tension between the interests of the child client and the interests of the larger transgender community.

219. *Welcome to HATCH*, HOUSTON AREA TEEN COAL. OF HOMOSEXUALS, <http://www.hatchyouth.org> (last visited November 5, 2010).

220. *Id.*

221. *HATCH – About Us*, HOUSTON AREA TEEN COAL. OF HOMOSEXUALS, <http://www.hatchyouth.org/about/> (last visited November 5, 2010).

222. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471, 476, 490 (1975) (discussing new obstacles facing those who advocated for school desegregation). Over time, the legal battle for school desegregation developed, as a byproduct, a “unique lawyer-client relationship.” *Id.* at 472. The American Bar Association (ABA) *Code of Professional Responsibility* recognized the ethical issues this modified relationship created; however, it was difficult for the ABA to resolve this possible conflict if the attorney’s idealistic views were the source of the problem. *Id.*

223. *Id.* at 504.

Transgender advocate Dean Spade notes how this tension between competing interests applies to transgender litigants.²²⁴ In regard to the interests of the larger transgender community, Spade explains, “because of the compromised and potentially dangerous character of successful litigation on behalf of [transgender clients, lawyers’] advocacy must also address the systemic problems inherent in the institutions,” and not simply focus on the individual client’s case.²²⁵ For example, the holding in *Yunits*, which focuses the analysis of a freedom of expression claim on the amount of harassment and abuse that a transgender youth experiences, has for better or worse created precedent that will effectively force transgender students to quantify their abuse and harassment.²²⁶ As to the interests of the individual client, Spade further explains that attorneys should educate their clients about “how legal claims are pursued by attorneys, and that attorneys working on such claims understand themselves to be determining not just the rights of a single plaintiff, but impacting a broad set of . . . people.”²²⁷

Still, the ABA standard explains that an attorney’s duty is, first and foremost, to advocate on behalf of her client, but recognizes that there are times when the attorney and minor client may disagree. Although it does not address conflicts between a transgender youth and her attorney specifically, the ABA standard provides some guidance and explains that “when the lawyer has established a trusting relationship with the child, most conflicts can be avoided.”²²⁸ This is easier said than done, especially

224. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003).

225. *Id.* at 35 (arguing that institutions often perpetuate derogatory sentiments and inhibit transgender people from seeking the help they need). Institutions such as “prisons, foster care, public benefits programs, [and] juvenile justice” are usually gender-segregated and often operate through domination, violence and harassment. *Id.* Because transgender people continue to be disproportionately low-income they often come into contact with governmental facilities and services in which they struggle against gender segregation. *Id.* at 36. As a result, advocates must address the systematic problems ingrained in our institutions that particularly impact individuals who defy conventional gender norms. *Id.*

226. See discussion in Part III.B.3.b. of this Article.

227. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 36 (2003) (arguing that individual victories for single plaintiffs could limit the rights of the transgender community as a whole). Although a single plaintiff’s victory can lead to an expansion of rights for a broad group, attorneys and activists must not solely rely on such cases. *Id.* at 36. There is a real danger in neglecting the rights of the many, particularly low-income clients, whose needs and situations may differ significantly from the single plaintiff in question. *Id.* at 35–36. Encouraging discussions between the transgender community and attorneys will help highlight the broader impact and consequences of single plaintiffs’ cases on the transgender community as a whole. *Id.* at 36.

228. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § B-1 (2006), available at <http://www.abanet.org/child/repstandwhole.pdf>.

when working with a population of children that has learned not to trust adults and other authority figures for fear of being rejected and ridiculed.

Even if you succeed in creating a safe space for your client, there is no easy answer to resolving the tension between the interests of an individual transgender youth and the interests of the larger transgender community. And, as explained above, a lawyer is ethically bound to advocate on behalf of her individual client. These tensions emphasize that litigation may not be the best avenue for addressing the problems that transgender youth face.

B. *Educators*

Litigation often has a negative effect on children. Many of the disadvantages of litigation that have been recognized in the context of child-custody disputes are the same disadvantages to litigating transgender children's claims. Primarily, "[t]he effects of the adversarial process exacerbate the detriment caused by the original, underlying problem."²²⁹ Moreover, transgender youth "may also be subject to the whims of judges and attorneys who do not understand their needs because they lack training and/or the time and resources to competently deal with the case."²³⁰ Thus, creating a safe space for transgender youth should begin before litigation becomes necessary.

To this end, in the following section, this Article aims to provide a framework for educators and administrators who want to make their schools a safe space for transgender students. This section is guided primarily by Stephen Thomas and Valerie Riedthaler's work on how to make colleges a safe space for transgender people, as well as other manuals aimed at helping organizations create a safe space for LGBT people.²³¹ Although schools, like attorneys, should reach out to community organizations and youth centers that are geared toward helping LGBT youth, schools can begin the process of creating a safe space by creating policies and implementing training for members of the school's community, as well as developing a mechanism by which transgender students can report harassment and those claims can be properly addressed.

229. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 124 (1997).

230. *Id.*

231. Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 593-97 (2006) (presenting ideas on how to create a safe space for transgender people).

1. School Policies and Training

A major step that schools can take toward affirming their support of transgender students and their safety is to implement and enforce anti-discrimination, anti-harassment, and other “safe school” policies.²³² As a general rule, schools should have basic nondiscrimination policies that prohibit any behavior that would make students feel unwelcome because of their race, color, religion, creed, sex, age, national origin, mental or physical disability, political belief or affiliation, and sexual orientation. However, the policies should also address the problems facing these individual groups. In regard to transgender students, the policy should, for example, address verbal and physical harassment. Specifically, these policies must include “a clear enumeration of the prohibited forms of conduct, including harassment on the basis of actual or perceived sexual orientation and gender identity.”²³³ Without an explicit pronouncement about what is considered harassment—slurs, taunting, teasing, bullying—the policies will be perfunctory.²³⁴ Other policies must also be carefully crafted so that they are effective.

However, it is not enough to create these policies. The policies must also be distributed and enforced. As an initial matter, the policies must be disseminated to members of the community—faculty, administrators, staff, and students.²³⁵ Training should be the primary tool for disseminating this information. The training for faculty, administrators, and staff should be designed to simultaneously educate them about common LGBT terminology, statistics about LGBT harassment, bullying, and suicide, and LGBT students’ legal rights. The training should also include a discussion of the policies created to maintain a safe space for LGBT stu-

232. GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK (GLSEN), *THE SAFE SPACE KIT: GUIDE TO BEING AN ALLY TO LGBT STUDENTS* 29 (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/294-6.PDF.

233. CALIFORNIA SAFE SCHOOLS COALITION, *SCHOOL SAFETY & VIOLENCE PREVENTION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER STUDENTS: A QUESTION & ANSWER GUIDE FOR CALIFORNIA SCHOOL OFFICIALS & ADMINISTRATIONS* 3, available at <http://www.casafeschools.org/LegalQA.pdf>.

234. NATIONAL EDUCATION ASSOCIATION, *STRENGTHENING THE LEARNING ENVIRONMENT: A SCHOOL EMPLOYEE’S GUIDE TO GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ISSUES* 23, 29 (2d ed. 2006), available at http://www.nea.org/assets/docs/mf_glbgtguide.pdf.

235. Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 593 (2006) (presenting ideas to be considered when creating “policies related to hiring, personnel evaluation, employee responsibilities, restroom assignment, and other pertinent to a given college program”).

dents, such as the need to have at least one gender-neutral bathroom on campus for transgender students, and why these policies are needed.²³⁶

While training for school employees should be mandatory, schools could also provide optional “anti-bias education programs” for students.²³⁷ These programs have been introduced in California schools and include “curricula, presentations by outside groups, and activities.”²³⁸ However, because these programs are fairly new, they can be misunderstood and, as a result, rejected by parents similar to the way sex education is often rejected.²³⁹ Thus, schools that decide to implement these programs should spend time informing and involving parents and community organizations, such as the PTA, about the purpose and content of anti-bias education programs.²⁴⁰ Even if a school does not implement these programs, schools can also encourage students to form LGBT support groups or invite organizations, such as Gay-Straight Alliances and Parents, Families, and Friends of Lesbians & Gays (PFLAG), to give optional lectures on campus or host periodic meetings to educate the community and provide support for LGBT students.²⁴¹

For administrations that decide not to implement training for their schools, nondiscrimination policies, at minimum, should be available in multiple formats, such as the internet, faculty handbooks, and student handbooks, for easy access.²⁴²

2. Reporting and Enforcement

In addition to policies, schools should establish a structured reporting mechanism within their organization for reporting violations of nondiscrimination policies.²⁴³ Thomas and Riedthaler suggest several guide-

236. See NAT'L EDUC. ASS'N, STRENGTHENING THE LEARNING ENVIRONMENT: A SCHOOL EMPLOYEE'S GUIDE TO GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ISSUES 29 (2d ed. 2006), available at http://www.nea.org/assets/docs/mf_glbgtguide.pdf.

237. CALIFORNIA SAFE SCHOOLS COALITION, SCHOOL SAFETY & VIOLENCE PREVENTION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER STUDENTS: A QUESTION & ANSWER GUIDE FOR CALIFORNIA SCHOOL OFFICIALS & ADMINISTRATIONS 2, 5, available at <http://www.casafeschools.org/LegalQA.pdf>.

238. *Id.* at 5.

239. *Id.*

240. *Id.*

241. SUICIDE PREVENTION RESOURCE CENTER, SUICIDE RISK AND PREVENTION FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH 43 (2008), available at http://www.sprc.org/library/SPRC_LGBT_Youth.pdf.

242. Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 593 (2006) (presenting ideas to be considered when creating “policies related to hiring, personnel evaluation, employee responsibilities, restroom assignment, and other pertinent to a given college program”).

243. *Id.* at 593–94.

lines for these reporting mechanisms.²⁴⁴ First there should be a route for reporting violations. Each school should designate people to serve as the route for reporting.²⁴⁵ There should be at least one male and one female and one staff member, faculty member, and administrator.²⁴⁶ Because members of marginalized groups often feel uncomfortable reporting discrimination or harassment to a person inside the organization, another option would be to create a website for reporting.²⁴⁷

No matter what reporting mechanism a school chooses to employ, it should be confidential, to the extent possible, in order to encourage people to report discrimination or harassment.²⁴⁸ Furthermore, to ensure the integrity of the process, if a school decides to designate people as reporting resources, any reports that they receive should immediately be converted into writing.²⁴⁹ If criminal activity is reported, it should be referred to the proper authorities, and this policy should be made clear to those reporting a wrongdoing to prevent the victim from feeling uncomfortable or embarrassed.²⁵⁰ This part of the procedure, involving authorities outside of the school, is not only meant to protect, but also weed out complaints resulting from overly sensitive individuals.²⁵¹

After a transgender student reports harassment or discrimination, according to Thomas and Riedthaler, a school should take three steps: (1) the investigation, (2) the decision, and (3) the follow-up.²⁵² During the investigation phase, all parties involved should be interviewed, and the parents of all witnesses and the accused and accusing parties should be notified.²⁵³ Additionally, the investigation should be conducted by a disinterested party or individual with no stake in the outcome of the investigation to avoid the appearance of impropriety, which could jeopardize the validity of the investigation.²⁵⁴ Investigations should be conducted as

244. *Id.* at 594 (suggesting implementation of requisite components for a structured reporting mechanism).

245. *Id.*

246. *Id.*

247. See Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 593–94 (2006).

248. *Id.* at 594.

249. *Id.*

250. *Id.* (providing a model for an effective reporting system).

251. *Id.*

252. See Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 594–95 (2006) (offering extensive thoughts on how to handle a harassment or discrimination charge).

253. See *id.* at 594 (illustrating the importance of information from all perspectives when addressing a discrimination matter).

254. *Id.* (recommending that an investigator should be used, whenever possible, to objectively collect the facts).

soon as the conduct is reported and in a way to protect confidence, to the greatest extent possible.²⁵⁵ The process of interviewing witnesses, the alleged victim, and the alleged harasser should be converted to writing.²⁵⁶ Moreover, interviewees should be warned that attempting to influence other interviewees will result in further disciplinary action.²⁵⁷ This can be extremely important when dealing with adolescents who are forced to face their alleged harassers on a daily basis.²⁵⁸ When confronting the alleged harasser, the investigator should allow the person or persons to respond to each of the allegations.²⁵⁹

Second, after completion of the investigation phase, administrators and/or an administrative body must make a final decision. In doing so, the administrators should base their determination on a preponderance of the evidence.²⁶⁰ This is a common standard in the legal community and has been intensely debated.²⁶¹ The simplest way to articulate this standard is that evidence “preponderates when it is more convincing to the trier than the opposing evidence.”²⁶² Whatever the decision-maker(s) determines should be made in writing and should provide specific details regarding the allegations, list the procedures taken, and provide a detailed explanation of the evidence that led to the decision.²⁶³

Finally, after the decision is made, the administration should follow-up with all parties involved.²⁶⁴ First, counseling should be made available to

255. *Id.* (emphasizing the importance of a quick and quiet investigation).

256. *Id.*

257. See Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 594–95 (2006).

258. See GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK (GLSEN), THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: EXECUTIVE SUMMARY 3 (2009), available at http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1676-1.PDF (examining the detrimental effects abuse, bullying, and other forms of victimization can have on a students' performance in school). The study outlined several recommendations to help schools improve the overall learning environment for LGBT students, including suggesting schools “[a]dopt and implement comprehensive bullying/harassment policies that specifically enumerate sexual orientation, gender identity and gender expression in individual schools and districts, with clear and effective systems for reporting and addressing incidents that students experience.” *Id.*

259. Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 594 (2006) (cautioning interviewers “the alleged harasser may or may not be guilty of the purported offense”).

260. *Id.* at 586.

261. 2 JOHN W. STRONG ET AL., MCCORMICK ON EVID. § 339 (5th ed. 1999).

262. *Id.*

263. Stephen B. Thomas & Valerie Riedthaler, Commentary, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 595 (2006) (outlining steps which should be taken in order to reach an accurate assessment of the harassment allegation).

264. *Id.*

all victims and anyone who may want to discuss the incident.²⁶⁵ Classroom reassignment for the victim or the violator may be considered an appropriate means of controlling the situation while taking into account the interest of both parties.²⁶⁶ The administrator may also need to determine if there are any other victims and “move to address any additional victim needs.”²⁶⁷

The problems of transgender youth reach far beyond the legal system. These children have to combat homelessness, discrimination, violence, and abuse. Thus, any approach to remedying their problems must be multifaceted. Educators should always strive to create a safe place for their students to learn and strengthen their identity before litigation becomes necessary.

CONCLUSION

Developing a positive self-image is a challenge for all adolescents.²⁶⁸ For transgender youth, specifically, “there is the additional challenge of integrating a complex gender identity with their cultural and ethnic backgrounds, personal characteristics, and family circumstances.”²⁶⁹ Thus, it is important for scholars to continue to write about this vulnerable subset of the transgender population. This scholarship must move beyond the abstractions that are common in most academic endeavors and provide practical guidance for attorneys and educators who work with transgender students and help them negotiate the discrimination and abuse they regularly encounter.²⁷⁰

265. *Id.*

266. *Id.* (addressing reassignment as a possible solution to verified harassment). Counseling services should be made immediately available to the victim. *Id.* Reassignment may be appropriate depending on the circumstances surrounding the harassment; this should be determined on a case-by-case basis. *Id.* Ultimately, the reassignment decision should be based on the “the best interest of the victim.” *Id.*

267. *Id.* (discussing the possibility of undiscovered victims). Implementation of a comprehensive policy addressing harassment claims should eventually encourage victims of unreported harassment to come forward. *See id.* at 593.

268. Arnold H. Grossman & Anthony R. D’Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 JOURNAL OF HOMOSEXUALITY 111, 113 (2006).

269. *Id.*

270. *See* Odeana R. Neal, *Making of a Law Teacher*, 6 BERKELEY WOMEN’S L. J. 128, 132–34 (1991) (arguing that legal academia’s emphasis on legal “scholarship” is exaggerated). Law school curriculum gauges intellect by evaluating one’s ability to grasp abstract principles from judicial decisions and apply them to concrete scenarios. *Id.* at 132. “The best lawyers were those who would go on to write the briefs that would lead to judicial opinions written by the best former lawyers, which would teach future lawyers what kind of lawyers they should strive to be.” *Id.* at 132–33. If legal scholars are sometimes incapable of comprehending the abstract language used in legal scholarship, the practicalities of applying their stated principles are unrealistic in real world practice. *Id.* at 134.

Yet, transgender youth are resilient, and their strength, resiliency, and extensive self-advocacy are often underplayed.²⁷¹ With support and guidance, these children will have the opportunity to lead full and healthy lives.²⁷² This is not an easy task, and this Article only skims the surface. However, it provides a starting point for advocates who are faced with the complexities of representing transgender youth and educators who struggle to create a safe space for transgender youth in schools. To this end, communities and lawyers must take a holistic approach when representing and helping a transgender youth, which may include finding them a home, helping them complete their education, and seeking counseling to help them cope with past physical, mental, and emotional abuse. These strategies will help transgender youth maintain the resilience they need to live in a society that persistently maintains a binary concept of gender.

271. Sarah E. Holmes, & Sean Cahill, *School Experiences of Gay, Lesbian, Bisexual and Transgender Youth*, in GAY, LESBIAN, AND TRANSGENDER ISSUES IN EDUCATION 63, 63 (James T. Sears ed., 2005).

272. See, e.g., CHERYL KILODAVIS, MY PRINCESS BOY (2011) (a nonfiction children's book inspired by a mother's struggle to accept and eventual acceptance of her son's identity expression that did not conform to his biological sex. The book also aims to teach acceptance of individuals' nonconforming identity expression.).